(16,294.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA, IN HIS OWN RIGHT AND AS GUARDIAN OF THE INFANT DEFENDANTS, EDITH LOUISE KENGLA AND EUNICE MARIE KENGLA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, EDITH LOUISE KENGLA and EUNICE MARIE KENGLA. } No. 533.

Supreme Court of the District of Columbia.

PHILLIP LEVIS
vs.
CHARLES R. KENGLA *et al.* } No. 14634, Eq. Doc.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter men-, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Amended Bill.

Filed May 16, 1895.

In the Supreme Court of the District of Columbia.

PHILLIP LEVIS
vs.
CHARLES R. KENGLA *et al.* } No. 14634, Eq. Doc.

To the supreme court of the District of Columbia, holding an equity court in and for said District:

After leave of the court first had and obtained, the complainant herein files this his amended bill of complaint and complains as follows:

First. That the complainant is a citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

Second. That the defendants are all citizens of the United States and residents of the District of Columbia, and defendant Charles R. Kengla is sued in his own right and as the guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, and that the said defendants, Edith Louise and Eunice Marie
2 Kengla, are sued in their own right and as the heirs-at-law of George M. Kengla, deceased.

Third. That on the thirteenth (13th) day of May, 1876, the complainant was the owner in fee of the following-described real estate situated, lying, and being in the District of Columbia, to wit: All that portion or part of a tract of land called "Alliance," which was

conveyed by Walter Smith to Agnes Levis by deed dated March 21, 1842, and recorded in Liber W. B. No. 96, folio 410, of the land records of the District of Columbia, which remain of the lands of the said Agnes Levis after conveyances of parts thereof made by her to Andrew Heiss on the 15th day of February, 1856, the deed of which is recorded among said land records in Liber N. C. T. 30, at folio 150, and by her to Edward Brooke by deed dated February 15th, 1866, and recorded among the land records in Liber R. M. H. 25, at folio 345, and to Phillip Brooke by deed dated the 15th day of January, 1856, and recorded among said land records in Liber 564, at folio 366. For a more particular description of the said land so conveyed reference to said deeds is hereby made, and copies thereof are herewith filed, and the same are prayed to be taken and considered as a part hereof—

The land thus remaining after said conveyancing being about sixty acres, more or less.

Fourth. And, being the owner thereof, plaintiff, on the said 13th day of May, 1876, executed a deed of trust to one Joseph Weaver, whereby he conveyed said described real estate of 60 acres, more or less, to said Joseph Weaver as trustee in fee and in trust to secure to the said defendants, Charles R. and George M. Kengla, a promissory note of the plaintiff for three hundred ($300.00) dollars, said note bearing even date with said deed of trust and made payable to the order of the said defendants in one year after the date thereof, with interest at the rate of ten (10 %) per centum per annum, payable annually, which said deed of trust is duly recorded among the land records of said District, in Liber 1815, at folio 463 *et seq.*, a copy of which is herewith filed and which it is asked may be considered as a part hereof.

Fifth.

That at the time of the said conveyance in trust last above named said real estate was encumbered by a prior deed of trust, also executed by the plaintiff to R. P. Dodge and Phillip Darneille and dated October 29th, 1875, to secure the promissory note of the plaintiff, bearing even date with said deed of trust, for the sum of $2,000.00, and payable in three years from the date thereof to one S. D. Clokey, with interest at 10 % per annum, payable semi-annually, which said deed of trust is recorded among the said land records in Liber 795, at folio 408, a copy of which is herewith filed and asked to be considered as a part of this bill.

Sixth.

That on the 29th day of October, 1877, said promissory note for $300.00 being overdue and unpaid, said Joseph Weaver,
3 trustee as aforesaid, by direction of the defendants Charles R. and George M. Kengla, who were the holders of said note, undertook to make public sale by auction of the said real estate at the hour of one (1) p. m. on the said 29th day of October aforesaid; but there being no bidders present or any person interested in the

purchase of said property, the threatened sale was objected to by the complainant and was not proceeded with until said defendants had stated to the complainant, in the presence of witnesses, that they only desired to obtain out of the property the amount of the incumbrance thereon, and that if he would permit them to go through the form of a sale the said defendants would take and hold the same for the benefit of the complainant and would reconvey the same to the complainant, or so much thereof as was left after sufficient had been sold to satisfy the defendants' claim, together with the costs of the sale; whereupon, and relying upon the promise of the said defendants that they would take and hold said property in trust for the use and benefit of the complainant, he permitted an informal sale of said property to be made to the said defendants by said trustee, Weaver; that no bids were made upon said property whatever except the one bid of said defendants of one thousand ($1,000.00) dollars, subject to a prior trust of two thousand ($2,000.00) dollars resting thereon; that complainant anticipated that a sale of a part of said tract might be made of some 27 acres to one Thomas M. Hume for an amount sufficient to pay off all of the indebtedness against said property, negotiations in that direction having already been commenced, and therefore the defendants, in furtherance of their said agreement, did not obtain title thereto until months thereafter, to wit, on the 17th day of January, 1878, which said deed of conveyance was recorded in Liber 874, at folio 817 *et seq.*, one of the land records of this District, a copy of which is filed herewith and asked to be considered as a part of this bill of complaint. The complainant further says that he has no personal knowledge whether the said defendants ever paid or cancelled the $300.00 note on account of which the attempted and informal sale in trust was made, nor whether they have ever paid the advertisement, auctioneer, or trustee's fees, but he says and avers the fact to be that no statement in relation thereto was ever given to this complainant, nor was any account of said transaction ever given him by any person, nor was any part of the $1,000.00, which would more than three times pay said note, ever paid or delivered to him in any way, manner, or form, and he says and avers the fact to be that the said $300.00 note is still in the possession of said defendant, Kengla.

Seventh. That the said real estate so attempted to be sold as aforesaid was worth at the time of the said attempted and conditional sale somewhere from ten to fifteen thousand dollars, and but for the arrangement and agreement made with said defendants, Kengla, that they would take and hold said property in trust for the use and benefit of the complainant, no such informal sale, under the circumstances, would have been permitted.

Eight-. That shortly after said conditional sale and trust transaction, to wit, on the 26th day of May, 1879, the said defend-
4 ants, Kengla, sold to one Thomas M. Hume something more than 27 acres of the rear or poorer portion of said tract of land for the price of $2,780.00 or thereabouts, $356.89 of which was paid in cash by the purchaser and the balance of $2,400.00 was represented by the notes of the purchaser, bearing even date with

said date of sale, being three of said notes and each for the sum of $800.00, payable one, two, and three years after date, with interest at six per centum per annum, secured by deed of trust on the property so sold, which said deed of conveyance and deed of trust are recorded, respectively, in the land records of this District in Liber 911, at folios 405 *et seq.* and 392 *et seq.*, copies of which are herewith filed and asked to be considered parts of this bill of complaint.

Ninth. The complainant says and avers the fact to be that the said sale of said 27 acres of ground to said Hume for said price of $2,780.00 was more than sufficient to pay off all of the indebtedness of the complainants upon said property and left more than thirty acres of said tract free and clear of all encumbrance, to which the said complainant is entitled, or if the said $2,780.00 was not sufficient to pay off all of said indebtedness the complainant hereby tenders himself ready and willing to pay into the register of this court, so soon as it can be ascertained, the balance of said indebtedness, with all interest thereon, together with all taxes, if any, paid by said defendants or any other person on account of said tract of land remaining in the possession of the defendants Kengla, and to which the complainant is entitled.

Tenth.

The complainant says and avers the fact to be that about a year after the said informal sale, owing to the complainant's business engagements in the city, he was obliged to leave said tract of land and move into the city; that the averment in the original bill that he moved from said land on account of a receipt of a notice to quit form the defendants is a mistake, as he never received any such notice, nor was any such notice given him, and that his only reason for quitting said land was his changed business relations, which compelled his presence in the city at 4 or 5 o'clock in the morning at the place of business where he was employed, and, it being impossible for him to get in in season from the county, he moved into the city; therefore the complainant continued in possession of said property for about one year after the said informal sale and trust agreement, and thereafter the house and improvements thereon burned down, since which time he has never reclaimed possession of said property, but it has continued and remained in the possession of the defendant Kengla, or all thereof except that portion sold to Hume and a strip across dedicated for street purposes; that the portion remaining in the possession of said defendants, Kengla, is about thirty acres of land.

Eleventh.

The complainant further says and avers the fact to be that the said defendants, Kengla, have, since the date of said trust agreement with the complainant, failed to carry out or to make any attempt to carry out the conditions thereof except in the matter of the sale of the said twenty-seven acres of land to said Hume, and, so far as complainant is advised, they have made and attempted to make no sale of the remainder of said tract of land, consisting of

thirty acres, until a short time before the filing of the original bill of complaint in this cause, when the complainant learned that they were attempting to make a sale of the whole of the remaining portion of said tract, as he is advised, for the price and sum of sixty thousand ($60,000.00) dollars, instead of selling a small portion of said tract, possibly an acre, which would sell for an amount three times sufficient to pay all taxes and any possible expense or money due to said defendants, Kengla, and the complainant becoming satisfied by the conduct of the said defendants, Kengla, that they did not purpose carrying out in good faith their said trust agreement with the complainant, thereupon filed his original bill of complaint herein for the purpose of compelling the said defendants to carry out their said trust agreement, and now files this his amended bill of complaint herein and tenders himself ready and willing to pay to the said defendants, Kengla, any and all claims, if any they have, against him or upon and against said real estate, as also to pay all taxes which they may have paid on account of said property, and is ready and willing to pay the same into the registry of this court at such times as said amount can be ascertained, with interest thereon at the legal rate.

Wherefore the complainant prays:

Prayers.

First.

That the defendants may be required to appear and answer the exegencies of this amended bill of complaint.

Second.

That an account may be taken of how much of said indebtedness of twenty-three hundred ($2,300.00) dollars, with interest and costs of sale, and any other outlays of defendants on account thereof have been satisfied to the defendants out of the real estate hereinbefore described, and on the coming in of said account that the complainant may be permitted to pay said amount to the said defendants, and that the defendants thereupon be required to reconvey to the complainant the rest and residue of said real estate, amounting to about thirty acres of land, more or less.

Third.

That the defendants Kengla may be restrained and enjoined by order and decree of this court from in any way encumbering or disposing of said property.

6 Fourth.

That the complainant may have such further and other relief as the nature of the case may require and to the court may seem just and proper, the premises considered.

That the defendants to this bill of complaint are Charles R. Kengla, Edith Louise Kengla, and Eunice Marie Kengla.

PHILIP LEVIS.

H. B. MOULTON,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, Phillip H. Levis, being sworn in due form of law, depose and say that I have heard read the above amended bill of complaint by me subscribed and know the contents thereof, and the facts therein stated of my personal knowledge are true, and those stated upon information and belief I believe to be true.

PHILIP LEVIS.

Subscribed and sworn to before me this 13th day of May, A. D. 1895.

LUKE C. STRIDER, *J. P.* [SEAL.]

Answer of Charles R. Kengla to Amended Bill.

Filed June 17, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
v.
CHARLES R. KENGLA *et als.* } No. 14634, Eq. Docket.

The answer of Charles R. Kengla to the amended bill of complaint.

1, 2.

He admits the allegations of the first and second paragraphs of the amended bill.

3, 4.

He also admits the allegations of the third and fourth paragraphs of the amended bill.

5.

He also admits the allegations of the fifth paragraph of the amended bill.

6.

In answer to the sixth paragraph of the amended bill this complainant denies any such arrangement with the complainant
7 as therein alleged, and he adopts as his answer to this paragraph of the amended bill the statements at large set forth in the fifth paragraph of the joint answer made by his brother, George M. Kengla, and himself to the allegations of the original bill.

Further answering this paragraph, he says that he had never heard of any such negotiations as alleged with Thomas L. Hume

and no such negotiations had ever been hinted at by the complainant prior to said sale or at any time.

7.

He denies that the property was worth at the time of said purchase by him and his brother the sum of fifteen thousand dollars or any sum approximating that amount, and he again denies any such arrangement as suggested in the seventh paragraph of the amended bill.

8.

He adopts as his answer to the eighth paragraph of the amended bill the answer made by him and his said brother in the eighth paragraph of their answer to the original bill.

9.

In answer to the ninth paragraph of the amended bill he says: The sale made to said Hume was fully known to the complainant and the amount for which said sale was made; that no demand was ever made upon this defendant for any reconveyance of the property remaining in him and his said brother after sale to said Hume, nor was any claim made of ownership or interest therein by the complainant.

10.

In answer to the tenth paragraph of the bill he adopts the statements contained in the ninth paragraph of the joint answer made by himself and his brother to the allegations set forth in the original bill herein, and he also refers to the allegation of the complainant in his original bill wherein he sets forth that he received a formal notice to quit said premises from this defendant and his said brother and vacated said property, which allegation is a correct setting forth of the facts of the case.

11.

In answer to the eleventh paragraph of the amended bill he says that it is true that he has not attempted to carry out any such alleged agreement as made in the complainant's original and amended bill because no such agreement was ever entered into between them.

12.

Further answering the allegations in the amended bill, this defendant adopts in full and makes as a part hereof the state-
8 ments in full set forth in his answer made jointly with his brother to the original bill herein.

CHARLES R. KENGLA.

GORDON & GORDON,
Solicitors for Defendants.

I solemnly swear that I have read the answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

CHARLES R. KENGLA.

Subscribed and sworn to before me this — day of 7, A. D. 1895.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Answer of Infant Defendants Herein, by Charles R. Kengla, Their Guardian ad Litem.

Filed June 27, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
v.
CHARLES R. KENGLA *et als.* } No. 14634, Equity Docket.

The answers of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, to the amended bill of complaint.

For answer these defendants say:

They are infants of tender years, and can therefore neither admit nor deny the allegations of the amended bill and submit their rights to the protection of the court.

CHARLES R. KENGLA,
Guardian ad Litem for Edith Louise and Eunice Marie Kengla.

GORDON & GORDON,
Attorneys for Guardian ad Litem.

I do solemnly swear that I have read the answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

CHARLES R. KENGLA,
Guardian ad Litem for Edith Louise and Eunice Marie Kengla.

Subscribed and sworn to before me this 27 day of June, A. D. 1895.

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

9 *Answer of Defendant Chas. R. Kengla, Guardian of Infant Defendants Herein.*

Filed June 27, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
v.
CHARLES R. KENGLA *et als.* } No. 14634, Equity Docket.

The answer of Charles Robert Kengla, guardian of Edith Louise Kengla and Eunice Marie Kengla, to the amended bill filed herein.

For answer to so much of said amended bill as he is advised it is necessary for him to answer he says:

He denies that any such conditional sale of the real estate in the proceedings named ever took place. He denies that any such agreement as alleged was ever made or contemplated by the father of the said infants or by any other party in interest in the premises. He alleges, on the contrary, the sale was made a *bona fide* sale and for valuable consideration, and was fully understood as such by the complainant as well as by the other parties in interest. He further alleges that no claim of ownership was made by the complainant in or upon said parcel of ground until negotiations had been made for sale of the same just shortly before the filing of the present suit; that the complainant never exercised any control over said property as owner or set up any claim thereto from the time of the sale of said property, in October, 1877, to the time of the filing of the original bill herein, on the 29th day of March, 1893.

He denies all the allegations made by the complainant as to ownership or interest in said real estate, and avers that he, the complainant, has no interest therein or any claim against said land or against said infant defendants by reason of any such agreement as alleged made with their father.

He further alleges that the fact that the deed from Joseph Weaver, trustee, to George M. and Robert Kengla had been executed and delivered and recorded was fully known to the complainant, and that he made no objection thereto, nor did he pretend that the same was not properly delivered, though the said trustee lived for many years after delivery of said deed.

CHARLES R. KENGLA,
Guardian of Edith Louise Kengla and Eunice Marie Kengla.

GORDON & GORDON,
Att'ys for Guardian.

I solemnly swear that I have read the answer by me subscribed and know the contents thereof; that the facts therein stated

10 of my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

CHARLES R. KENGLA,
Guardian of Edith Louise Kengla and Eunice Marie Kengla.

Subscribed and sworn to before me this 27 day of June, A. D. 1895.

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Order Permitting Plaintiff to Submit Proposed Amendments to Court for Consideration.

Filed November 13, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
vs.
GEORGE M. KENGLA *et als.* } Equity. No. 14634.

This cause coming on to be heard and the case being opened by reading bill and answer thereto, and the court having declared its disposition to decide against the claim of the plaintiff upon the ground of laches unexplained in the original or the amended bill, thereupon the plaintiff prayed for leave to amend the allegations of his amended bill for the purpose of meeting the objections of the court, and it is this 13th day of November, A. D. 1895, ordered that the plaintiff be, and he is hereby, allowed seven days within which time to file and submit to the court the amendments by him proposed for consideration of the court.

A. B. HAGNER,
Asso. Justice.

Petition for Leave to Amend Bill of Complaint.

Filed November 19, 1895.

In the Supreme Court of the District of Columbia.

PHILIP L. LEVIS
vs.
GEORGE M. KENGLA *et al.* } No. 14634, Eq. Doc.

The petition of Philip L. Levis, complainant in the above-entitled cause, for leave to further amend the bill of complaint filed herein, and for cause therefor respectfully submits to the court—

That he is by business and avocation a butcher and has from childhood to the present time been engaged in that business, during the most of which time he has been in the employ of others;

11 that he is an illiterate man, being scarcely able to read or write; that at the time of the pretended sale in this case he had the distinct understanding and agreement with the said defendants, Kengla, that they would hold said property in trust for his use and benefit; that thereafter defendant Charles Robert Kengla told complainant that he could redeem said property any time within twenty years from the date of said sale; that defendant Robert Kengla at one time sent for the complainant and advised complainant that he wished to convey his, complainant's, interest in said property to the complainant's wife and children; that by reason of the statements and communications of the defendants he had every reason for believing and did believe that they purposed to act in good faith with him and properly account to him for the property involved in this suit; that by reason of the communications and assurances of the defendants all suspicion that they would not act in good faith was disarmed, and he rested upon their integrity as manifested by their statements and conduct that they would carry out in good faith the trust which they had received for his benefit. The complainant further says that the said defendants nor either of them in any way renounced their trust relation with the complainant or gave him any notice that they purposed so to do until about the time of the complainant's filing his bill of complaint in this cause, when by their attempted sale of the entire tract for the price and sum of sixty thousand dollars ($60,000.00) he became alarmed and for the first time was led to believe that they did not purpose carrying out the trust which they held for the complainant. Complainant further says that immediately upon making such discovery he filed his bill of complaint herein. Complainant further says that during the years that have elapsed he has often been advised that his claim was not barred until the expiration of twenty (20) years from the day of said pretended sale, and that at any time within said period if said defendants, Kengla, should fail to account he could compel them to do so. Complainant further says that he was also informed that the holding of the said Kenglas in trust for him was the same as his holding, and that the statute of limitations or other bar could not arise until said defendants, who held the said property in trust for his use and benefit, should renounce said trust relation and give him personal notice of such renunciation, which, said complainant says, they have never done. Complainant further says that he is a man of very limited means and a man of large family, and has for years been struggling for the purpose of getting in better financial condition so that he might pay to said defendants such balance, if any, as might remain due to them and be able to take his property and handle the same for the interests of himself and family. Complainant further says that if he had been advised or had understood that he could have reclaimed his property at any time without first tendering to the defendants the small balance due them he would have done so, but his agreement and understanding was that their claim should first be settled and the balance of money derived from said property should go to him.

Wherefore the complainant prays the court for permission
12 to amend the bill of complaint filed herein in harmony with the subject-matter of this petition.

PHILIP L. LEVIS,
Complainant.

Subscribed and sworn to before me this 19th day of November, A. D. 1895.

JOSEPH FORREST,
Notary Public, D. C. [SEAL.]

Amendment to the Bill of Complaint.

Filed November 26, 1895.

In the Supreme Court of the District of Columbia.

PHILIP L. LEVIS
vs.
GEORGE M. KENGLA *et al.* } No. 14634, Eq. Doc.

After leave of the court first had and obtained, the complainant amends his bill of complaint herein by adding to the tenth paragraph thereof the following, to wit:

That he is by business and avocation a butcher and has from childhood to the present time been engaged in that business, during most of which time he has been in the employ of others; that he is an illiterate man, being scarcely able to read or write; that at the time of the pretended sale in this cause he had the distinct understanding and agreement with the said defendants, Kengla, that they would hold the said property in trust for his use and benefit; that thereafter defendant Robert Kengla told complainant that he, the complainant, could redeem said property at any time within twenty (20) years from the date of said pretended sale; that said defendant, Robert Kengla, at one time sent for the complainant and advised him that he (Kengla) wished to convey the complainant's interest in the said property to the complainant's wife and children; that by reason of the statements and communications of the defendants he had every reason for believing and did believe that they purposed to act in good faith with him and properly account to him for the property involved in this suit; that by reason of the communications and assurances of the defendants all suspicion that they would not act in good faith was disarmed, and he rested upon their integrity as manifested by their statements and conduct that they would carry out in good faith the trust which they had received for his benefit.

The complainant further says that the said defendants nor either of them in any way renounced their trust relation with the complainant or gave him any notice that they purposed so to do until about the time of the complainant's filing his bill of complaint in this cause, when by their attempted sale of the entire tract for the sum

of sixty thousand ($60,000.00) dollars he became alarmed and
13 for the first time was led to believe that they did not purpose carrying out the trust which they held for the complainant. Complainant further says that immediately upon making such discovery he filed his bill of complaint herein. Complainant further says that during the years that have elapsed he has often been advised that his right to recover his property or the value thereof would not be barred until the expiration of twenty years from the day of said pretended sale, and that at any time within the said period, if said defendants, Kengla, should fail to properly account to him, he could compel them so to do. Complainant further says and avers the fact to be that he was also informed and advised that the holding of the said Kenglas in trust for his use and benefit was the same as his own holding, and that the statute of limitations or other bar could not arise until said defendants, who held said property in trust for his use and benefit, should renounce said trust relation and give him absolute or personal notice of such renunciation, which the complainant says they have never done.

Complainant further says and avers the fact to be that he is a man of very limited means and large family and has for years been struggling for the purpose of accumulating a sufficient fund ahead, which he knew the defendants claimed, to pay off their said claimed balance or whatever sum, if any, might of right be due them.

Complainant further says that if he had known or understood that he could have reclaimed his property at any time without first settling the small balance due the defendants he would have done so long ago, but he understood that the law compelled him to pay to the defendants such balance as they claimed remained due them before he could assert his claim to the property, and, indeed, his understanding and agreement with them was that their claim should be first settled and then the balance of the money, if a sale of the property had been accomplished, or the balance of the property, if no sale had been accomplished, should be delivered or conveyed to him.

Wherefore the complainant prays.

H. B. MOULTON,
Solicitor for Complainant.

Decree Refusing Permission to Amend and Dismissing Original and First Amended Bills.

Filed November 26, 1895.

In the Supreme Court of the District of Columbia.

PHILLIP L. LEVIS
vs.
CHARLES R. KENGLA *et als.*
} Equity. No. 14634.

This cause coming on to be heard on the application of the complainant for permission of the court to file an additional amendment

to the bill by him filed herein, and the proposed amendment
14 being considered, it is, this 26th day of November, A. D. 1895, adjudged, ordered, and decreed that the application be, and the same hereby is, denied, the court being of opinion that the proposed amendment does not present a case for the intervention of this court; and the case further coming on to be heard on pleadings, evidence, and argument, and being considered by the court, it is ordered and decreed that the bill and amended bill filed herein be, and the same hereby is, dismissed with costs.

A. B. HAGNER,
Asso. Justice.

Notice of Appeal.

Filed November 27, 1895.

In the Supreme Court of the District of Columbia, this 26th Day of November, A. D. 1895.

PHILLIP LEVIS
vs.
KENGLA *et al.*
} # 14634, Eq. Doc. 35.

The court in the above-entitled cause having entered a decree dismissing the bill of complaint herein, the complainant hereby appeals therefrom and asks that said appeal be allowed and the amount of bond or security on said appeal be fixed by the court.

H. B. MOULTON,
Solicitor for Complainant.

It is hereby *ordered* that the appeal be, and the same is hereby, allowed, and that the penalty of the appeal bond be, and the same is hereby, fixed at one thousand dollars.

A. B. HAGNER.

Nov. 27, '95.

Memorandum.

1895, Dec. 16.—Bond for appeal filed.

Depositions of Three Witnesses on Behalf of the Defendant.

Filed September 10, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
vs.
GEORGE M. KENGLA *et al.*
} In Equity. No. 14634, Docket No. —.

WASHINGTON, D. C.,
TUESDAY, *July 2d*, 1895—half past one o'clock p. m.

The parties met again at the office of J. Holdsworth Gordon pursuant to notice.

Present on behalf of the complainant, Mr. Moulton.

Present on behalf of the defendant, Mr. Gordon.

15 Whereupon JOHN J. JOHNSON, a witness called on behalf of the defendant, having been duly sworn, was examined—

By Mr. GORDON:

Q. What is your profession?

A. I am a member of the bar of the supreme court of the District of Columbia.

Q. Did you know the late William D. Cassin?

A. I knew him well.

Q. Did you ever have any transactions with him or for him that enabled you to see him sign his name?

A. When he was elected a member of the legislature of the District of Columbia I attended to all his business; that pending in the various courts and all subsequent business that he turned over to me. I saw him write often and would know his handwriting now should I see it.

Q. Will you state, Mr. Johnson, whether Mr. William D. Cassin is at present living?

A. He is dead.

Q. Have you any idea how long he has been dead?

A. I have not. I know he died a great many years ago.

Q. Will you look at that paper, please, and state whether that is in his handwriting?

A. The paper now shown me is in the handwriting of the late William D. Cassin.

Mr. GORDON: I want to offer this paper in evidence.

The examiner marked the paper Exhibit J. J. J. No. 1.

EXHIBIT J. J. J. No. 1.

Joseph Weaver, trustee, in ac. with Philip Levis, Dr.

Oct. 29th, 1877. To proceeds of sale of part of "Alliance," subject to prior trust of $2,000.....		$1,000
CR.		
By Thomas Rawlings' bill, &c.:		
advertising.....	$60	
" trustee's comm's.....	50	
By taxes paid for 1876–'7, 94.18, & interest at 10 per cent. from August 14th, 1877.....	97	27
By taxes of 1877–'8, ½.....	35	25
By am't p'd note of Kengla & Bro.....	343	75
" *by* balance paid Levis; this balance paid on interest of 1st note for order of Levis.....	413	73
	$1,000	

Mr. MOULTON: I object to it on the ground that it is incompetent and immaterial.

JOHN J. JOHNSON.

Signed by the examiner with consent of counsel.

16 CHARLES R. KENGLA, the defendant, was then recalled.

By Mr. GORDON:

Q. Will you look at that paper, please (showing witness J. J. J. Exhibit No. 1), and state if you recognize that?
A. I do, sir.
Q. Will you state where you got that paper?
A. Mr. Cassin sent it to me.
Q. Will you tell who Mr. Cassin was?
A. He was my attorney.
Q. Can you tell me whether he represented Mr. Weaver, the trustee?
A. Could not say. I don't think he did. I think Mr. William Dunlap was his attorney.
Q. Will you tell me when that was sent to you?
A. Just after the final settlement.
Q. Will you look at the paper I now hand you and state whether you have ever seen it before?
A. I have.
Q. Tell me from whom you received it.
A. I got it from Mr. Dodge; Dodge and Darneille, at the time, I think.

Mr. GORDON: I now offer in evidence the paper just identified by the witness, which is a note dated Washington, D. C., October 25th, 1875, for $2,000, made by Phillip Levis, payable three years after date to the order of S. D. Clokey.

The examiner marked the note C. R. K., Exhibit No. 1.

EXHIBIT No. 1, C. R. K.

Secured by deed of trust.

$2,000. WASHINGTON, D. C., *October 29th*, 1875.

Three years after date I promise to pay to the order of S. D. Clokey two thousand $\frac{00}{100}$ dollars, with interest, at the rate of ten per cent. per annum, until paid, interest payable semi-annually, value received.

No. —. Due ——.

[PHILIP LEVIS.]*

(Written across the face:) Cancelled.

Endorsement: [S. D. Clokey.]*

Q. When this was turned over to you by Robert P. Dodge, did you pay him anything for it?
A. Yes, sir; $2,000.
Q. At the time the sale took place, which is now in dispute, were you still the owner of this note?
A. Yes, sir.
Q. Will you look at that note and state where you got it?
A. I got that from the same man.

[*Words enclosed in brackets erased in copy.]

17 Mr. GORDON: I now offer in evidence the note of May 13th, 1876, for $300, payable one year after date, signed by Philip Levis.

The examiner marked the note C. R. K., Exhibit No. 2.

EXHIBIT No. 2, C. R. K.

Secured by deed of trust of even date and duly stamped.

$300.00. WASHINGTON, D. C., *May* 13, 1876.

One year after date I promise to pay to the order of Mess. George Kengla & Bro. three hundred dollars, with interest from date at ten per cent. per annum, payable [semi-]* annually, princip*le* and interest payable at German and American savings bank.

PHILIP LEVIS.

Endorsement.

Q. Was there any interest paid on either of these notes during the time you held them?

A. No, sir.

Q. No interest paid on either date up to the time of the sale?

Mr. MOULTON: I object to this, as the matter was gone over in the former examination-in-chief.

A. No, sir.

Q. You have spoken in your former examination-in-chief of a notice to quit that was served upon Mr. Levis. Can you remember in whose hands that notice was put?

A. Dick Trunnell, I believe.

Q. Do you mean Richard Trunnell, of Georgetown?

A. Yes, sir; he is dead.

Q. Do you know how many years he has been dead?

A. I do not. I believe ten or fifteen years.

Cross-examination.

By Mr. MOULTON:

Q. Can you tell me when and where you first saw Exhibit J. J. J. No. 1?

A. Well, that was a few days after the settlement.

Q. Mr. Kengla, you- answer gives me no date or place. Will you be so kind as to state the date?

A. I could not state it.

Q. Can you state the place?

A. I think it was in the market or it may have been in his office. He used to be with me in a good many transactions of that kind. I cannot state *state* the place as to this one, whether it was in his office or at the market.

[* Word enclosed in brackets erased in copy.]

18 Q. It was not handed to you in the presence of Mr. Levis?
A. No, sir.
Q. You never showed it to Mr. Levis?
A. Not knowingly I did, sir.
Q. So far as you know, Mr. Levis never saw it?
A. Could not say; he might have.
Q. When and where did you first see the paper marked Exhibit C. R. K. No. 1, which is the $2,000 note referred to in those proceedings?
A. Well, saw that in the market, too. He asked me to loan him some money on it. We told him that we would; that we had some money.
Q. Who?
A. R. P. Dodge.
Q. Were you present?
A. Yes, sir.
Q. Do you remember what amount you gave him for the note?
A. Well, I think it was $2,000; very near that. I could not say positively, but we bought the note, whatever it was.
Q. In whose handwriting is the word "cancelled" on the face of the note, if you know?
A. Don't know, sir.
Q. Is it not in your handwriting?
A. No, sir.
Q. Nor in the handwriting of your brother?
A. I could not say, sir, whether it is or not.
Q. State, if you know, who made the pen-marks through the name "Philip Levis" at the botton of the note.
A. Don't know, sir.
Q. Or the pen-marks through the name "S. D. Clokey," on the back of the note.

Mr. GORDON: All this is objected to as entirely immaterial, being merely the cancellation of the note.

A. I do not know.
Q. This note was not due until a year or more after the sale in 1877?
A. Really, I could not say.
Q. It is dated October 29th, 1875, for three years, is it not?
A. I never noticed it, but I see it is that way now; yes, sir.
Q. So the sale having been made in October, 1877, and this note not being due until three years after the 29th of October, 1877, the note was not due until a year or more after the sale?
A. Yes, sir.
Q. Did not this note remain in your possession until after the bringing of this suit?
A. I think not, sir.
Q. When did it leave your possession, if it has left it at all?
A. I could not really say.
Q. This particular note, did it not remain in your posses-

19 sion until you delivered it to Mr. Gordon, in the possession of yourself or your brother?

A. Might have been in his possession, sir, but not in mine.

Q. Do you remember whether this word cancelled was written on the face of the note before or after you handed it to Mr. Gordon?

A. I think it was written there before, sir.

Q. When?

A. I could not say.

Q. You do not know by whom it was written?

A. No, sir.

Q. You do not know where it was written nor when it was written?

A. I don't know whether it was written there before or after I delivered it to Mr. Gordon, but I think it was there before. I would not like to say positively.

Q. You never handed this note to Mr. Levis or offered it to him nor have you ever shown it to him?

A. Not to my knowledge, sir.

Q. And the note has from the time you bought it from Dodge in the market remained in your possession or that of your attorney down to the present time?

A. Yes, sir.

Q. Look at Exhibit C. R. K. No. 2, which is the $300 note referred to in these proceedings, and state to the examiner whether that is in any — cancelled.

Mr. GORDON: That is objected to, as the paper speaks for itself, having been put in evidence by us.

A. I don't see that it has been cancelled.

(By Mr. MOULTON:)

Q. So that this paper, as it now stands, is the promissory note of Philip Levis, dated May 13th, 1876, payable to the order of George Kengla and Brother, for three hundred dollars, one year after date, uncancelled, or in any — satisfied, so far as appears from the note?

A. Well, we were satisfied by getting the place. That is the only way I know how to answer that. We sold the place and were satisfied.

Q. Then this note made by Mr. Levis of $300 has remained in your possession from the time you first purchased it from Mr. Dodge down to the present time uncancelled and in its present condition as we see it?

A. I suppose that is right, sir.

Q. You have never offered to return it to Mr. Levis, have you?

A. No, sir.

By Mr. GORDON:

Q. When you handed over your papers to us had you at any time, from the date of the sale down to the date you handed

20 these papers to us, made any writings or marks upon any of these notes?

A. No, sir.

Q. They were then as they had been handed to you?

A. Yes, sir.

By Mr. MOULTON:

Q. Had you made any entries or marks on the notes prior to that time?

A. No, sir.

CHARLES R. KENGLA.

Sworn and subscribed to before me this tenth day of September, 1895.

CHARLES W. STETSON, *Examiner.*

Mr. GORDON: I want to offer in evidence first the deed of trust from Philip Levis and wife to Robert P. Dodge and P. A. Darneille, recorded in Liber 795, folio 408.

The examiner marked this deed C. R. K., Exhibit No. 3.

C. R. K., EXHIBIT No. 3.

This indenture, made this twenty-ninth day of October in the year of our Lord one thousand eight hundred and seventy-five between Philip Levis and Mary Clara Levis, his wife, of the county of Washington, and District of Columbia of the first part, and R. P. Dodge and P. A. Darneille of the city of Washington in said District of the second part.

Whereas, the said Philip Levis is justly indebted unto S. D. Clokey, in the sum of two thousand dollars, for which amount he has passed his promissory note bearing even date with these presents and payable to the order of the said S. D. Clokey in three years after date, with interest at the rate of ten per cent. per annum, until paid—interest payable semi-annually—And whereas the said parties of the first part are desirous to secure the full and punctual payment of the said debt with all interest and costs in and upon the same.

Now therefore this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar, in lawful money of the United States, to them in hand paid by the said parties—of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said parties of the second part their heirs and assigns, all that tract of ground situate in the county of Washington in the District of Columbia being all that portion of a part of "Alliance" conveyed by Walter Smith to Agnes Levis by a deed dated 21, March 1842 and

recorded in Liber W. D. No. 96 folio 410, which remained to
21 the land of Agnes Levis, after the conveyances of parts thereof made by her to Andrew Heiss on 15th February 1864 in Liber N. C. T. 30 folio 150 to Edward Brooke on 15th February 1866 in Liber R. M. H. 25 fol. 345 and to Philip L. Brooke on 15th January 1866 in Liber 564 fol. 356 and containing about sixty acres.

Together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the said parties of the first part, of, in, to or out of the said described real estate and premises.

To have and hold the said described real estate and premises and appurtenances, unto and to the use of the said parties of the second part their heirs and assigns.

In and upon the trusts nevertheless, hereinafter mentioned and declared, that is, in trust to permit the said Philip Levis his heirs or assigns, to use and occupy the said described premises, and the rents, issues and profits thereof; to take, have and apply, to and for his and their sole use and benefit, until default be made in the payment of said note or of any interest due or any proper cost, charge, commission, half commission or expense in and about the same.

And upon the full payment of all of said notes and the interest thereon, and all other proper costs, charges, commissions, half commissions and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Philip Levis his heirs or assigns, at his or at their cost.

And upon this further trust, that default being made in the payment of the said promissory note or of any instalment of interest due thereon or any proper cost, charge, commission, half commission or expense in and about the same, then at any time thereafter, to sell the said described real estate and premises, at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement, as the said parties of the second part their heirs or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee-simple to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money; and of the proceeds of said sale or sales, first, to pay all proper costs, charges and expenses, and to retain as compensation a commission of five per cent. on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and lastly, to pay the remainder, if any, to said Philip Levis his executors, administrators or assigns.

And the said Philip Levis does hereby agree, at his own cost, during all the time, wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against fire, in the name and to the satisfaction of said parties of the

second part, who shall pay whatever may be received there-
22 from to the payment of the matter hereby secured, whether due or not; and that upon any default or neglect to so insure, any party secured hereby may have said improvements insured and the expense thereof shall be a charge hereby secured and bear like interest, as the matter secured.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

PHILIP LEVIS. [SEAL.]
MARY CLARA LEVIS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. HOLDSWORTH GORDON.

DISTRICT OF COLUMBIA, *County of Washington,* } ss:

I, J. Holdsworth Gordon, a notary public in and for the said county, in said District, do hereby certify that Philip Levis and Mary Clara Levis, his wife, parties to a certain deed bearing date on the twenty-ninth day of October, A. D. 1875, and hereto annexed, personally appeared before me in said county, the said Philip Levis and Mary Clara Levis, his wife, both being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Mary Clara Levis, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and my notarial seal this twenty-ninth day of October, A. D. 1875.

J. HOLDSWORTH GORDON,
Notary Public. [SEAL.]

Endorsement: Deed of trust. Philip Levis *et ux.* to R. P. Dodge and P. A. Darneille. Received for record on the 1 day of November, A. D. 1875, at 12.45 o'clock p. m., and recorded in Liber No. 795, folio 408, one of the land records for Washington county, in the District of Columbia, and examined by S. Wolf, recorder.

Mr. GORDON: I also offer in evidence the deed of release from Dodge and Darneille to Robert and George Kengla, recorded in Liber 874, folio 413.

The examiner marked this deed C. R. K. No. 4.

EXHIBIT C. R. K. No. 4.

This indenture, made this eighteenth day of January A. D. 1878 between Robert P. Dodge and Philip A. Darneille of the first part

trustees under certain deed of trust from Philip Levis and
23 wife bearing date on the 29th day of October A. D. 1875 and recorded in Liber No. 795 at folio 408 *et sequitus*, of the land records of the District of Columbia, and George M. Kengla and Charles Robert Kengla of the second part.

Witnesseth, that said parties of the first part as trustees aforesaid, for and in consideration of one dollar current money of the United States, to them in hand paid by said parties of the second part, the receipt of which, before the ensealing and delivery of these presents, is hereby acknowledged have bargained, sold, released and conveyed, and do hereby bargain, sell, release and convey to said parties of the second part and their heirs, all that certain piece or parcel of ground situate and being in the county of Washington District of Columbia, and known and distinguished as part of a tract of land called "Alliance" and more fully described by metes and bounds in said deed of trust to which reference is hereby made together with the buildings and improvements thereon, and the appurtenances and hereditaments thereunto belonging or in anywise appertaining;

To have and to hold the same with the appurtenances unto and to the only use of said parties of the second part, and their heirs, free, released and forever discharged from the effect and operation of the trust deed above referred to—the purpose for which said trust deed was made having ceased and determined as evidenced by the production of the note secured and the same by the parties hereto of the first part cancelled, by direction of the parties hereto of the second part, the holders of said note and now the owners of said property.

In testimony whereof, the said parties of the first part as trustees aforesaid have hereunto set their hands and seals the day and year first above written.

ROB'T P. DODGE, *Trustee.* [SEAL.]
P. A. DARNEILLE, *Trustee.* [SEAL.]
GEO. M. KENGLA.
CHARLES ROBERT KENGLA.

DISTRICT OF COLUMBIA, } *To wit:*
County of Washington, }

I, William Tindall, a notary public in and for the county and District aforesaid, do hereby certify that Robert P. Dodge and Philip A. Darneille, parties to a certain deed bearing date on the eighteenth day of January, A. D. 1878, and hereto annexed, personally appeared before me, in the county aforesaid, the said Robert P. Dodge and Philip A. *Dodge* being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this eighteenth day of January, A. D. 1878.

WILLIAM TINDALL,
Notary Public. [SEAL.]

24 Endorsement: Release. Dodge & Darneille to George & Rob't Kengla. Received for record January 26, A. D. 1878, and recorded in Liber No. 874, folios 413. Examined by Geo. F. Schayer, dep. recorder.

Mr. MOULTON: It is admitted by counsel for the complainant that the deed just offered in evidence from Dodge and Darneille to George and Robert Kengla is in the handwriting of William D. Cassin.

It was thereupon stipulated and agreed between counsel for complainant and defendant that the testimony heretofore taken in this cause before this examiner may be used as though the same had been taken after the filing of the amended bill and answers thereto.

Mr. MOULTON: It is further admitted by counsel for the complainant, in order to save the defendants' counsel additional labor, that Joseph Weaver, the trustee, died February 5th, 1881, and that William D. Cassin died August 6th, 1888, as appearing from the papers filed in the orphans' court.

The parties thereupon adjourned until Tuesday, July 9th, at 2 o'clock p. m., at the same place, when the complainant will take testimony under amended bill.

WASHINGTON, D. C.,
TUESDAY, *September 3d*, 1895—9.30 a. m.

The parties met, pursuant to agreement, at the office of Dr. H. H. Barker, # 1116 H St. N. W., city.

No appearance on behalf of the complainant.

Present on behalf of the defendant, J. Holdsworth Gordon.

Present also, the examiner.

Whereupon HOWARD H. BARKER, a witness called by and on behalf of the defendant, having been duly sworn, was examined—

By Mr. GORDON:

Q. Please state your full name.
A. Howard H. Barker.
Q. You are a practicing physician?
A. Yes, sir.
Q. How long have you been a practicing physician?
A. Since 1870.
Q. Did you ever know William H. Triplett?
A. I knew a W. H. Triplett.
Q. Was he a physician?
A. Yes, sir.
Q. Have you any idea where his location was as a physician?
A. Well, he was in the office with Dr. Ross. I know where Dr. Ross's office was at different times. He was at 10th and F Sts., at 11th and F Sts., and at 11th a- G Sts. I know that Dr. Triplett was with him at two of these places, 11th and F Sts. and 11th and G Sts.; but I do not know whether he was with Dr. Ross at 10th and F Sts. or not.
Q. Do you know whether he is alive or not at the present time?

25 A. I have heard that he is dead.

Q. You know that he is not on your list of practicing physicians?

A. Yes, sir; I know that he is not. I think he died at an insane asylum.

Q. He was a member of your fraternity when alive, was he not?

A. Yes, sir.

HOWARD H. BARKER.

Signed by the examiner with consent of counsel for the complainant.

Counsel for the defendant thereupon announced his testimony closed.

DISTRICT OF COLUMBIA, *ss:*

I, Charles W. Stetson, examiner in chancery in and for the city of Washington, District of Columbia, do hereby certify that the foregoing deposition was taken down by me in shorthand from the oral statements of said witnesses at the time and place mentioned in the caption thereto; that said depositions were thereupon reduced by me to typewriting; that the depositions of John J. Johnson and Howard H. Barker *was* signed by me with consent of counsel; that the deposition of Charles R. Kengla was read over by him and by him subscribed to in my presence, he having been first duly sworn, before taking of said deposition, to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel in said cause or otherwise interested in the result of said suit.

I further certify that my fee of eight dollars has been paid to me by counsel for the defendant.

CHAS. W. STETSON,
Examiner in Chancery.

Depositions of Eight Witnesses on Behalf of the Complainant.

Filed October 16, 1895.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
vs.
GEORGE M. KENGLA. } In Equity. No. 14634, Docket No. —

WASHINGTON, D. C.,
MONDAY, *February 18th*, 1895—two o'clock p. m.

The parties met, pursuant to notice, at the office of H. B. Moulton, Esq., No. 1003 F street N. W., Washington, D. C.

Present on behalf of the complainant, H. B. Moulton.

Present on behalf of the defendant, J. Holdsworth Gordon.

26 Whereupon PHILIP L. LEVIS, the complainant, having been duly sworn, was examined—

By Mr. MOULTON:

—. Mr. Levis, state your age, residence, occupation, &c.
A. My residence is 902 22d St. N. W.
Q. Have you always lived in Washington?
A. Well, for these last 15 or 16 years.
Q. Where did you live before coming to Washington?
A. I lived a mile above Georgetown; I lived in the District.
Q. Did you live on the property involved in this suit?
A. I did.
Q. Who was the former owner of this property?
A. My grandmother, Agnes Levis.
Q. How did you acquire an interest in the property?
A. By deed from my father and stepmother.
Q. Have you that deed or a copy of it with you?
A. I have not.

Mr. MOULTON: Mr. Gordon, I will ask permission to file a copy of it with the examiner.

Q. Who was the owner of the property described in the bill in 1875?
A. Agnes Levis.
Q. In 1875?
A. No; it was not her in 1875; it was my father, deceased, and stepmother.
Q. About when did you get an interest in it?
A. About 1879, I think it was.
Q. No; it was sold by public auction under a deed of trust in 1878.

Mr. GORDON: I would suggest that it would be better to let him go ahead himself.
The WITNESS: Well, I was the owner in 1875.

(By Mr. MOULTON:)

Q. How many acres of land did it consist of?
A. 60 acres.
Q. Did your stepmother have an interest in it?
A. She had a life interest in it.
Q. How long had you been living on that property?
A. About 32 years.
Q. You were born there, then?
A. I was born there.
Q. And lived there all your life?
A. Yes, sir; up to the time I moved away.
Q. Did you borrow any money on this property? If so, when, what amount, and for what purpose?
A. I borrowed $2,000.
Q. Do you remember when that was?

A. I borrowed that in 1875.
27 Q. How was it secured?
A. By a deed of trust.
Q. Who were the trustees?
A. Dodge and Darneille.
Q. Do you remember what time that loan was to run?
A. Three years.

Mr. GORDON: I will object to this line of testimony in view of the fact that the loan will show for itself.
Mr. MOULTON: In you- answer you admit it.
Mr. GORDON: Then you do not have to prove it.

Mr. MOULTON: Now for what purpose did you obtain that $2,000—what did you do with it?

Mr. GORDON: I object to that question on the ground that it is immaterial what he wanted that $2,000 for, so far as the issues of this case are concerned.

A. Well I wanted $1,000 to pay my stepmother for her right in that property.

(By Mr. MOULTON:)

Q. Her dower interest, her life interest?
A. Yes, sir.
Q. What did you do with the balance of it?
A. The other $1,000 I spent in improving the property, fencing and fixing up the house, put a pump in.
Q. So that the whole of this sum was expended in buying your stepmother's life interest in the property and in improving the estate itself?
A. The estate and the taxes. There was some $200 or $300 that I paid in taxes.
Q. How did that property come to your stepmother, by will or deed?
A. By deed.

Mr. GORDON: That is also objected to as immaterial.

(By Mr. MOULTON:)

Q. Did you thereafter obtain any further loan on this property?
A. I did.
Q. From whom did you obtain such loan and what was the amount?
A. It was $300, and that came from Robert and George Kengla.
Q. The defendants in this suit?
A. The defendants in this suit.
Q. Who was the trustee?
A. That was Joseph Weaver.
Q. What time was that to run?
A. One year.
Q. Was that second deed of trust ever foreclosed?

A. Not to my knowledge.

28 Q. Wait now. Don't answer my question unless you understand it. Was the property ever sold under the second deed of trust?

A. Not to my knowledge. Yes; it was sold under the second deed of trust.

Q. Now, let me repeat my question. Was that deed of trust securing the $300 foreclosed and the property sold?

A. Yes; the property was sold under the $300 deed of trust.

Q. Now, will you be so kind as to state in your own manner all about the proceedings at the time of the sale, telling who was present, what occurred, and all about it?

A. Mr Robert Kengla came to me and asked me for a settlement.

Q. Tell when that was.

A. That was about two weeks before the sale; so I told him I could not settle with him at that time.

Q. Go ahead.

A. And Mr. Humes had partly promised to buy part of my land, and I thought in a short time I could settle with him the whole amount I owed him. He said that would not do; that he wanted his money right away; he must have it; so I think the very next day he advertised it for sale. Then at the time of the sale there was no one there to bid on the property, being no one only what was really interested and had to be there. I objects to the sale; so Mr. Kengla asks me if I could raise $100 or $150, which I told him I could not do. Then he asks me to let the sale go on; that he did not want the land and would have nothing from it only what I owed him; that he would sell it or I should sell, and I was to have the benefits all over and above what I owed him, and, of course, the expense of the sale, &c., was mentioned.

Q. What did you say to that proposition?

A. Well, I no more than said for it to go on with the proposition that he was to give me all over and above—he was to take only what he had on it and I was to have the balance. Of course, I had to submit to it going on.

Q. I understand that you consented to the sale on the terms of his statement to you?

A. His statement to me.

Q. Can you tell who was present?

A. There was Mr. Thomas Downing, the auctioneer; Mr. Joseph Weaver, the trustee, and his son; Mr. Purcell, Robert Kengla, George Kengla. Then there was another man. I don't know his name; myself and a colored man.

Q. When you called Mr. Kengla's attention to the fact that there were no bidders present, did he deny it?

A. He did not.

Q. Did he thereupon or thereafter submit the proposition to you that you have stated about the sale of the property?

A. He did.

Q. To permit the sale to proceed?

A. To permit the sale to proceed.

Q. Upon the terms that he had designated?

29 A. That he had designated.

Q. Supposing you had sold the property, was there any agreement between you and Mr. Kengla as to what should become of the proceeds after paying what was due him?

A. That was to come to me.

Q. Was that the agreement?

A. That was the agreement that he was selling on.

Q. In case of sale what was to become of the proceeds of the sale after paying what was due him?

A. It was to come to me.

Q. All of it?

A. All of it.

Q. Who was present and heard that agreement, if you know?

A. Mr. Purcell heard that. I know he did. He was right there at the time, standing by us.

Q. Did you make any effort to make a sale of this property after this agreement between you and Kengla?

A. I did make one effort.

Mr. GORDON: Give us Mr. Purcell's name.

A. I don't remember.

(By Mr. MOULTON:)

Q. Please state to the examiner that transaction as far as it went, particularly if Mr. Kengla knew of it.

A. Well, I saw a man, Dr. Triplett, that saw this property and seemed to be very well pleased with it. He offered me a house and lot on Capitol Hill and to pay this incumbrance by me agiving him a $1,000 in $10 payments.

Q. What was the value of the house and lot?

A. Well, I should think the property was worth $10,000, the house and lot.

Q. He was to give you a house and lot for your interest in this property, subject to the $2,300?

A. Subject to the $2,300 or whatever it would be. He was to pay off the incumbrances and give me a house and lot and I was to give him $1,000.

Q. How long after the time of this sale was that?

A. Well, that was a month; at least a month. It may have been more or it may have been not quite so long, but it was some little time after this sale had taken place.

Q. Why was not that sale accomplished?

A. Well, the Doctor sent for me and I went there.

Q. Dr. Triplett?

A. Dr. Triplett sent for me; so he spoke about the outlet of this property; so he said he had been over to see Mr. Kengla.

Mr. GORDON: Well, I object to this line of testimony; to any statements made by Dr. Triplett unless made in the presence of Mr. Kengla.

The WITNESS: And he offered him $500 down and told him that in 30 to 60 days he would have the whole amount, if desired.

30 Q. What else?

A. So he asked me then about this outlet, and I told him there was an outlet, I was sure, for my father had sold a piece of land for so much and the right of an outlet for his property; so he told me to get him a copy of the deed of it, which I could not find; so he said if there was any trouble he would not take it. (After a pause:) Mr. Triplett said if there was any trouble about this outlet he did not want it; would not purchase it.

Q. What, if anything, did Mr. Kengla know about this transaction?

A. Well, he knew that Dr. Triplett told me——

Mr. GORDON: That is objected to. Any statements made by Dr. Triplett are objected to.

Mr MOULTON: State what Dr. Triplett did, not what he said.

A. Well, Dr. Triplett went to him to make this payment.

Mr. GORDON: Just let me ask a question there. I would like to know whether he is speaking of his own personal knowledge.

Mr. MOULTON: Are you speaking of your own personal knowledge or of what Dr. Triplett told you?

A. That is what Dr. Triplett told me.

Mr. GORDON: Then, of course, I object to that.

A. Then I went to see the Doctor several times afterward, but could not see him.

Mr. MOULTON: Mr. Examiner, just read my question.

The examiner read as follows: "What, if anything, did Mr. Kengla know about this transaction?"

A. Then I went to see him two or three times, but could not catch him. That was the last of that transaction.

Q. Did not Mr. Kengla know about this transaction, and did not he state things about the road to Dr. Triplett which prevented the sale?

Mr. GORDON: That is objected to as leading and as suggestive, in view of the fact that the witness has already stated that all the information he has on that subject was derived from Dr. Triplett and not from Mr. Kengla.

A. Yes, sir; he did. There was nobody else to tell him as I knew of.

(By Mr. MOULTON:)

Q. Do you know what they were?

A. Well, they must have been in regard to the deed of the property or the deed of the road, rather. He wanted me to get it for him, which I could not.

Q. From whom did you say the $2,000 loan was obtained?

A. Robert and George Kengla.

31 Q. So that the $2,000 indebtedness was due Robert and George Kengla, and they also held the $300 note under which this sale was made.

A. That is right, sir.

Q. Mr. Levis, how long did you remain on this property before you left after this attempted sale?

A. Very near a year; about a year.

Q. About a year. Before you left the property were you employed in that vicinity or in the city?

A. I was employed in Washington.

Q. Did you have any interviews with either of the defendants in this suit before you left the property; and, if so, what?

A. I did.

Q. Tell us about them, please, in full.

A. Well, now, Robert Kengla came over there one day.

Q. How long after the sale was that?

A. Oh, I guess it was a month; over a month.

Q. Go ahead.

A. So he spoke of some compost he had. He wanted to know if I would object to him putting it on the ground; so I told him that it would not, provided——

Q. It would not or you would not?

A. I would not object, provided I should have the right in disposing of this property; that it should remain the same as it had been. If that would not interfere with the sale of this property, which he said it should not.

Q. Do you mean with your agreement about the sale of your interest in this property?

A. About the agreement. He said it should not.

Q. Was the compost put on the ground?

A. It was.

Q. Did he at any time send for you to come to his house about this property?

A. He did.

Q. Tell us about that.

A. I was working in the city, and one evening when I came home he had left word for me to come over to see him. I went over there and he spoke to me. He said he wanted the right to transfer what would be coming out of that property to my wife and children.

Q. Coming out of that property to whom?

A. To me and my wife and children.

Q. Give us all that conversation as near as you can recollect it.

A. Well, he told me right up and down, "There's a man you owe a little bill. I know he will come on you."

Q. Well?

A. He said that there was a man that I owed a bill to, and that he (the man) wanted to make it out of what would be coming out of that property, but that he (Kengla) wanted my wife and children to get all the benefit out of it.

Q. What did you say to that?

32 A. I told him, of course, that that was all I wanted it for—for my wife and children.

Q. Did he prepare any papers or anything at that time?

A. He did not.

Q. What did he say about it?

A. He asked these questions and I submitted to them.

Q. Do you mean submitted or consented?

A. Consented to them. Then I told him what little I owed that man I know he would not come down on me for, for the agreement he made with me was that he would not bother me for it unless I was able to pay it.

Q. What reason did Kengla give for wanting to convey your interest to your wife and children?

A. He said it was on account of that man.

Q. Why on account of that man?

A. He said that man would come down and levy on my interest in that property.

Q. How long was that after this attempted sale?

A. Well, that must have been a copule of months, I guess.

Q. Was it longer than that; was it not a short time before you left the property?

Mr. GORDON: That question is objected to as leading, suggestive, and in every way obnoxious to the rules of evidence.

Mr. MOULTON: I will strike out the question if you will consent.

Mr. GORDON: No; I would sooner let it stand, to show how you have to lead him on.

Mr. MOULTON: How long before you left the place did this conversation occur?

A. Not long.

Q. How long after this attempted sale under the deed of trust before you left the place?

A. Well, it was nearly a year.

Q. So that if the attempted sale under the $300 deed of trust occurred in October, 1877, this interview must have been in the latter part of 1878, must it not?

Mr. GORDON: That is objected to as purely a matter of argument, suggestive, and leading.

A. It must have been in 1878.

(By Mr. MOULTON:)

Q. What part of 1878?

A. Well, now, I can't answer that. I know it was some time before I left.

Q. Well, if the sale was in October, 1877, when must it have been?

Mr. GORDON: That is objected to.

Mr. MOULTON: Please state to the examiner, Mr. Levis, in your own way, how you came to move off this property.

33 A. Now I was working for Mr. Brooke, my cousin, and Mr. T. S. Brooke's father, it was; so Mr. Brooke told me——

Mr. MOULTON: Go right ahead.

A. Well, Mr. Brooke told me that I would have to be there earlier of a morning that I was getting there; so I looked around and spoke for a house. Well, just a while before I was getting ready to leave—I don't think over a week or a couple of weeks—there was a notice sent on; but that was my reason for leaving—on account of my work—being there early every morning.

Q. Did the notice that was sent to you have anything to do with your leaving?

A. Not at all.

Q. So that if there is such an averment in your bill it was a mistake?

Mr. GORDON: I object to this statement as contradictory to the bill, if there is such an averment.

Mr. MOULTON: Did you at the time of the preparation of the bill filed in this cause state to your then solicitor that you moved from that property because there was a notice to quit served on you?

A. I don't think I did. It was my intention, and I think I told him so, that I was so far away from my work that that was the cause of my leaving.

Upon the question being read again by the examiner to the witness:

A. I did not.

Q. Please state to the examiner why you have not heretofore redeemed this property from the Kenglas.

A. Because I never had the means to redeem it; thinking that I might raise a few hundred dollars, then my intention was to go to them and redeem my property.

Q. And pay them what?

A. Pay them the balance that was due them.

Q. Have they ever or either of them at any time prior to their filing their answer in this case notified you that they would not carry out their contract?

A. They did not.

Q. At the time of this agreement made at the sale or attempted sale was there any limit of time within which you were to redeem your property?

A. There was not.

Q. Anything of the kind suggested or mentioned in any way or form?

A. He suggested he did not want the property and would not have the property except the expenses of sale and his money.

Q. When you left the premises at the time of the sale or attempted sale, with whom did you walk away?

A. Mr. Kengla and Mr. Purcell.

Q. Was the matter talked of?

34 A. It was.

Q. Was that statement repeated as you left?

A. It was; half a dozen times or more.

Q. He wanted nothing out of the property except what was due him?

—. He said he wanted me to distinctly understand he would not have anything from it except what I owed him.

Q. What was the value of this property at the time of this attempted sale?

A. I thought that the property was worth from $12,000 to $15,000. That was my impression.

Q. You mean the whole 60 acres?

A. The whole 60 acres.

Q. That would be an average of about how much an acre?

A. About a little upwards of $200 an acre.

Q. Upon what do you base your judgment as to the value of the ground?

A. Well, my father had been offered $12,000 two or three times, and he was offered more than that by taking a trade—trading for a piece of property down in Prince George's.

Q. Did you know of the sale of any property in that immediate vicinity?

A. I did.

Q. About what figure had it sold for?

A. $1,000 an acre.

Q. About that time?

A. Well, I reckon a couple of years before.

Q. Where was that property located?

A. Well, that was very near adjoining my place. The property it was off of was adjoining, but that was on the road.

Q. Do you know of the sale of any other property about there?

A. Mr. Brooks sold a piece of property for $200 an acre before that time.

Q. What else?

A. Well, that is about all I know of up to that time. No—then Mr. Humes was talking about buying some of my land.

Q. This talk of yours with Mr. Hume about selling part of this land to him. Did that occur before this sale?

A. That occurred before the sale under the $300 deed of trust.

Q. What part of this tract was it that you were trying to sell to Mr. Hume?

A. The back part of it; the woods part.

Q. The most valuable or the least valuable?

A. The less valuable.

Q. What kind of ground was that?

A. It was hilly; most of it woodland.

Q. Any part of it cultivated?

A. Very little.

Q. Was that the rear portion of the farm, farthest from the road?

A. Yes, sir.

35 Q. Was that piece of land subsequently sold to Mr. Hume?
A. It *is*.
Q. How much were you asking Mr. Hume for this rear and less valuable part?
A. I told him I would leave it to Mr. Brooke and Mr. Rosenbush.
Q. What the ground was worth?
A. Yes; the part of it that he agreed to buy.
Q. Did he consent to this proposition?
A. Now, Mr. Brooke told there was a part——
Q. Did Mr. Hume consent to this proposition?
A. He partly consented.

Mr. GORDON: All this is objected to.

Mr. MOULTON: I am only fixing the value. If he partly consented, to what part did he consent and what was done?
A. Well, he promised to buy all that is by the Tunlaw road; so Mr. Rosenbush told him what he would want for what was cut off his property next to Mr. Hume. Then Mr. Brookes was asked what he wanted. Well, his was a hundred dollars an acre.
Q. Did Mr. Hume take it?
A. He did.
Q. Well, as to your ground?
A. Well, he asked me what I wanted. I left it to Mr. Brookes and Mr. Rosenbush, and they said mine was worth as much as Mr. Brookes' and more.
Q. As much as this part of Mr. Brookes' that was sold to Mr. Hume for $100 an acre. Was that the desirable or the poorer part of the land?
A. It was the poorer part; some that had not been cultivated, I believe.
Q. How about stone?
A. Well, it was stone land.
Q. Was any conclusion reached as to the price that was to be asked for your ground or part of it?
A. Well, I told him I was willing to take what he paid Mr. Brookes.
Q. $100 an acre?
A. $100 an acre. He told me to come and see him a few days afterward. I went there, but I never could catch him in any more.
Q. In your judgment, Mr. Levis, resting it upon the sources of information that you have stated, what was the value per acre of that part of your ground that is now involved in this suit at the time of this attempted sale under the $300 deed of trust?
A. It was worth considerably more than the back part of it, and I should think that the back part was worth a hundred dollars an acre or more.
Q. Then, what would be, in your judgment, the value of the land involved in this suit per acre?
A. Well, about 300 or 350 dollars per acre at that time.

36 Q. You mean by that the front portion of the land that was not sold to Mr. Hume?

A. I mean that part.

Q. Does this portion of the land to which you now refer lie adjacent to the Tunlaw road?

A. It was right opposite.

Q. Does it front on the Tunlaw road?

A. It fronts on the Tunlaw road.

Q. For what distance does it front on the Tunlaw road?

A. It runs on the Tunlaw road for a quarter of a mile, anyhow.

Q. At the time of this attempted sale under the $300 deed of trust or thereafter was any account rendered to you by the trustee under the deed of trust or the Kenglas, who held the notes secured by it, of the disposition made of the fund derived from the sale?

Mr. GORDON: Objected to so far as the Kenglas are concerned, and also so far as the trustees are concerned, because the latter inquiries are not pertinent to the issues in this case at all.

A. None at all whatever.

MOULTON:

Q. Did the defendants in this suit sell part of this land to Hume?

A. They did.

Q. How much, if you remember?

A. About 27 acres.

Q. For what price, if you know?

A. $100 an acre.

Q. Have they rendered to you any account for that sale showing the disposition of the fund arising therefrom?

A. None at all.

Q. Did the defendants or either of them at any time until the filing of their answer in this suit deny to you that property was yours, subject only to the small amount of money due them?

A. They never made any objections.

Q. Never denied it?

A. Never denied it.

Q. Have they at any time or in any way given you any suggestion up to the filing of this suit that it was not their purpose to carry out their agreement with you made at the time of the attempted sale?

A. None at all.

Q. How much of this ground, if you know, still remains in the name of the defendants, the Kenglas?

A. Between 28 and 30 acres.

Q. Do you know the present value of the ground remaining in their possession?

Mr. GORDON: That is objected to as not pertinent to the issue, except as showing why he brought this suit.

A. About $2,000 an acre.

37 (By Mr. MOULTON:)

Q. Shortly after this attempted sale did not property advance very rapidly in value in that part of the District?

A. It did.

Q. Do you know what this land was worth per acre at the time of your last interview with the Kenglas or either — them in relation to it?

A. Well, the whole tract would have been worth, I thought, 200 to 250 dollars an acre.

Q. At the time Mr. Kengla sent for you and expressed his desire to convey your interest to your wife and children, fearing that a creditor might attach it, what was it worth then?

A. 200 to 250 dollars an acre.

Q. Upon proper application of the fund arising from the sale by the defendant of the part of this tract to Thomas L. Hume, what would be the balance remaining due the Kenglas?

Mr. GORDON: That is objected to as a matter of pure computation, and the question is also founded upon the assumption that this complainant was entitled to an accounting when he has not shown that he asked for one.

A. I expect from 100 to 300 dollars.

(By Mr. MOULTON:)

Q. Then, as you understand the account, $300, with interest thereon, would be all your indebtedness to the defendants?

A. That is all.

Mr. GORDON: That is also objected to—both question and answer.

(By Mr. MOULTON:)

Q. State whether you are ready and willing to pay that amount or whatever amount there is due now or at any time that the court may direct you to make such payment.

A. I am.

Mr. GORDON: That is objected to, as it is immaterial whether he is ready and willing or not when the court directs him to.

(Mr. MOULTON:)

Q. State why you did not, prior to the filing of this suit, make application to the defendants for the purpose of paying off the balance due them and taking back your property.

A. Just because I had not the means to do it with. It was my intention to do it as soon as I got the means.

Q. Were you advised by any one that there was any necessity for you to make such an application in order to maintain your rights until such a time as you were prepared to pay them?

Mr. GORDON: That is objected to as a matter entirely immaterial.

A. I was not until I filed this suit—entered the suit.

Mr. GORDON: I withdraw the objection.

38 (By Mr. MOULTON:)

Q. Is there any other fact, Mr. Levis, within your knowledge relating to this matter that you desire to state to the examiner? If so, please do so.

A. I guess that is about all.

Q. While you remained on this property after this attempted sale, as you say, for about one year, did the defendants or either of them ask you for any rent or anything of the kind?

A. None at all.

Q. Did you pay any rent to anybody while you were there?

A. I did not.

Q. At the time the defendants made this sale to Thomas L. Hume did they advise you about it or confer with you in relation to it?

A. They did not.

Q. Did you know about it at the time?

A. I did not.

Q. Did the defendants or either of them tell you at any time that you could sell this property by paying $1,000 down and the balance in one and two years?

Mr. GORDON: That is objected to, as the witness has already stated in response to a question asked him by his counsel that he knew nothing at all further material to the case. He has made no such intimation, and the question asked him by counsel is suggestive, leading, and improper in every way.

A. They did.

(By Mr. MOULTON:)

Q. When, where, and under what circumstances was that statement made?

A. Well, that was made while I was on the place. It was made at the time of the sale and after the sale.

Q. How did Mr. Kengla come to make that statement to you?

A. Well, he made that when I objected to the sale and then he made it when I spoke to him about Dr. Triplett buying.

Q. Can you not state just what he said, in his own language, as near as you can?

A. Mr. Kengla told me after I objected to the sale——

Mr. GORDON: Mr. Robert Kengla?

A. Mr. Robert Kengla. That I could sell the property by paying him $1,000 cash and the balance in one and two years, and to pay him just what I owed him, the cost of the sale and the amount of the notes.

(By Mr. MOULTON:)

Q. He would take it in that way, $1,000 in cash and the balance in two years. Was that prior to the sale to Hume and before the sale to Hume had left a smaller amount due?

A. Yes, sir.

39 Cross-examination.

By Mr. GORDON:

Q. Mr. Levis, how much did you borrow from Mr. Kengla?

A. I borrowed $2,300. I borrowed $2,000 at one time and $300 next time.

Q. Do you know a man named Clokey?

A. Yes, sir.

Q. Who was Mr. Clokey?

A. Well, he was a relative of mine by marriage. He was my stepmother's brother and also a cousin.

Q. I see you state in your bill that the first deed of trust was to secure Mr. Clokey. You did not get the money from him?

A. Well, now, I did not get it from him. I got it from the bank.

Q. You got the money out of the bank. Who gave you the check?

A. Mr. Dodge.

Q. By whom was the check made?

A. That I cannot tell.

Q. Was it made by either of the Kenglas?

A. Well, now, Mr. Gordon, I cannot tell, for I did not know the money came from the Kenglas until after I got it.

Q. You did not know the money came from the Kenglas until after you got it. Now, as a matter of fact, did not the Kenglas buy that note after they had loaned you the $300 under the second deed of trust, and did not you know that to be so?

A. I do not.

Q. You did not state that in the testimony you gave some time ago?

A. I did not.

Q. Did you testify in your former testimony that the money came from them?

A. I testified that I was under the impression that it came from them.

Q. You were present at the sale that was made under the second deed of trust, the $300 deed of trust, and the property was actually put up for sale by the auctioneer, was it not?

A. It was.

Q. And it was regularly knocked down to the Kenglas, was it not?

A. It was knocked down after my objection to the sale.

Q. It was knocked down to him by the auctioneer and you objected to it?

A. Yes, sir.

Q. Did you have any restraining order or other legal paper to restrain the sale of that property?

A. No; I had none. The only objection was there was no one there to bid on the property.

Q. Nevertheless the sale took place. Now, do you remember when that was?

40 A. That was in——

Q. What year?

A. About '78, I think.
Q. Was it not in October, 1877?
A. About that time.
Q. It was in October, 1877?
A. In October, 1877.
Q. Now, after the sale you say you had some talk with Mr. Kengla?
A. Mr. Robert Kengla.
Q. You stated that Mr. Purcell was present?
A. Yes, sir.
Q. You testified before in this case, did you not?
A. Yes, sir.
Mr. GORDON (on the witness hesitating and looking at Mr. Moulton): You need not look at your counsel. You remember whether you did or not.
A. I gave testimony before.
Q. Did you mention Mr. Purcell in that former testimony?
A. I think I did.
Q. Did you mention any conversation had with Mr. Robert Kengla in the presence of Mr. Purcell in reference to any agreement that you should redeem this property?
A. There was no such time——

Mr. GORDON: Repeat the question.
The examiner read the previous question.

A. I did. I mentioned that. I am sure I did.
Q. In your former testimony?
A. Yes, sir.
Q. Was Mr. Purcell produced there to testify himself in that case?
A. Was he produced?
Q. Did he testify?
A. No; he has not testified.
Q. How long did you stay on that property?
A. I stayed about a year, to the best of my knowledge and belief, after the sale.
Q. Did Mr. Kengla not tell you that you could have a short time in which to redeem that property?
A. He did not.
Q. Did he tell you you could have an unlimited time?
A. He told me he did not want the property; that he would sell it or I should sell it. He wanted me to distinctly understand that he did not want anything from the property, only the costs. What he wanted was his money.
Q. Was your agreement in writing?
A. It was not.
Q. How long after the sale was it before the deed was given to Mr. Kengla?
41 A. I don't know; only the son of the trustee told me it was near about a year.

Mr. MOULTON: I object to that answer, Mr. Examiner, being hearsay.

Mr. GORDON: You knew that the deed was given to him?

A. I did not know it until later.

Q. Do you mean to say that you never knew that the deed had been given to that property by the trustee to Mr. Kengla?

A. Not until recently.

Q. When did you first find it out?

A. About the time I was to file this suit.

Q. Did you not know a portion of that property had been sold to Mr. Hume?

A. I did.

Q. When did you first find that out?

A. Well, I don't know. I don't think I knew it while I was up there. I don't think I heard it until after I left the place.

Q. How many years prior to the bringing of this suit did you know of the sale to Mr. Hume?

A. Well, I knew Mr. Hume had brought part of it. What I understood of this was that he (Kengla) had sold part of it, but had not got quite what I owed him.

Q. You knew the sale had taken place?

A. I knew between Mr. Hume and Mr. Kengla.

Q. Do you know when that was?

A. I do not.

Q. Do you know how soon after the time that the sale was made that you first heard of it?

A. I am not able to say. I am sure I was away from there when I heard it. I could not say whether it was two weeks or two years.

Q. But you knew it—within two years after the sale?

A. Yes; I know it could not have been over that.

Q. So you must have known it in 1879?

A. Yes.

Q. Did you go to Mr. Kengla and protest against this sale of a portion of this property to Mr. Hume?

A. No; I did not know it was made.

Q. You just said you knew it was made.

A. Well, of course, the transaction was made between Hume and him, but I never knew it when I saw Mr. Kengla.

Q. You knew in 1879 or 1880 that that piece of property had been sold to Mr. Hume, did you not?

A. I did.

Q. When you found that out did you go to Mr. Kengla and demand of him an accounting?

A. No, sir.

Q. You never asked him anything about it?

A. No, sir.

Q. Nevertheless, in your testimony that at the time you valued the land at between $200 and $300 an acre—will you explain
42 to us why it was that, knowing that he had sold the property,

and that you were only indebted $200, that you never asked him to account for that property or to deed it back to you?

A. I was not able. I had not got enough to satisfy his claim. My intention was to go to him as soon as I was able to raise $200.

Q. You did not ask him during all that time to convey it back to you?

A. No, sir.

Q. You never went to him and claimed that it belonged to you?

A. No, sir.

Q. So that the first claim you made from that time down to 1893 was when you brought this suit?

A. Yes.

Q. During the time from 1877 to 1893 how much taxes have you paid on that property?

A. I have paid nothing.

Q. From the time you left the property down to the time of bringing this suit had you exercised any ownership over the property?

A. Well, I have acknowledged it.

Q. I am not asking whether you acknowledged it. I ask if you exercised any ownership over the property.

A. Well, I once employed a lawyer by the name of Bell. I spoke to him and told him about the way it stood, but I had no means to go ahead and claim it, so he agreed to do it for me; so of course he taken the case, and it was not long after he taken it before he died.

Q. So that no pretence was made to Mr. Kengla that you owned the property?

A. That I don't know.

Q. You made none, I mean.

A. I made none—that is, except 10 or 12 years ago.

Q. And from that time down to the bringing of this suit the matter rested?

A. The matter rested.

Q. Now, you say that Mr. Kengla came to you and told you it would be well for you to convey any interest you might have in the property to somebody for the benefit of your wife and children?

A. He wanted to convey to my wife and children all that would be coming out of that estate after he got his claim.

Q. Why was it not done?

A. Well, he had not got his money out of it. Up to that time I did *do* think the sale had been made.

Q. Did you agree to that conveyance?

A. I did.

Q. When was that? Do you remember?

A. That was before I left the premises.

Q. You never, after you left the premises, went to him and asked him to carry out that agreement, so that matter passed away?

A. Yes, sir.

Q. Now, you have spoken of an understanding with Dr.
43 Triplett. You say Dr. Triplett was to give you a house worth $10,000. He was to assume the indebtedness on the farm and was to pay you $1,000?

A. No; I was to pay him $1,000, $10 a month.

Q. That negotiation or agreement came to naught because of an inability on your part to show him a deed for an outlet on the place?

A. Well, I could not get the deed and I was at work and had not got the time to attend to it. I went to the widow of the man the land belonged to. She said there was a deed made, but it was only as long as my father lived.

Q. So that negotiation fell through?

A. Yes; of course I could not attend to it.

Q. And so you preferred to look after your wife and children and let the matter rest?

A. I put confidence enough in them to think that it was all right.

Q. How long did you stay on that property after the sale?

A. About a year, I think.

Q. How did you happen to leave that property?

A. Well, I was working with my uncle and cousin. My cousin told me as much as I would either have to move in town near his place of business or lose my situation. Of course I consented to do so, and I had spoken for a house when they served a notice, but I left on account of my work. Either I had to lose my situation where I was.

Q. Then a notice to quit was served on you?

A. Yes, sir.

Q. Signed by the Kenglas?

A. Well, there was a notice served, but whether it was signed or not I don't know.

Q. Did you not in your former testimony testify that a notice to quit signed by the Kenglas was served on you?

A. I got a notice, I know.

Q. And in that paper they claimed to be the owners of this piece of property which you were then occupying?

A. Well, now, I can't say they did.

Q. What did the notice say?

A. Well, Mr. Gordon, true as I am sitting here, I could not say how the notice read.

Q. You have not that notice now?

A. And whether my wife got it and told me of it or whether it was served at Mr. Brookes, I could not say.

Q. How long after receiving that notice or receiving knowledge of it was it that you left the property?

A. I believe about a week.

Q. You left before the termination of the time set in the notice?

A. I had spoken for a house and I moved as soon as the parties went out.

Q. When you left this property whom did you leave in charge of it?

A. I did not leave any one in charge of it.

44 Q. Did you leave anybody representing you?

A. I did not leave anybody representing me more than Robert Kengla, which he proposed to take the place and put this

fertilizer on it, working the ground. He said he would put the fertilizer on it and work it. I said, "Robert, will that interfere with the agreement you have made with me about this property?" He said, "Not at all; it will not make any trouble at all."

Q. Have you not testified in your examination-in-chief that this conversation in regard to the compost occurred after the sale?

A. Yes, sir.

Q. Then you do not wish to be understood as saying that that conversation occurred after you left the property, do you?

A. No; that did not occur after I left the property.

Q. Then you never had any conversation with Mr. Kengla after you quit that property in regard to your claim to it?

A. I don't think I ever did, any more than to speak to them at a distance.

Q. When you brought your suit you had been informed that this property had been sold, had you not?

A. No; I had not been informed that it was really sold. I had been informed that they were about to make a sale of it.

Q. Had you not been informed that negotiations were pending for the sale of this property, and did you not in consequence bring your suit and claim to be the owner thereof?

A. Yes, sir.

Q. So the first time that you thought of pressing any claim as to the owner was when you heard a sale was about to be made?

A. Well, of course, I made a claim 10 or 12 years before to a man by the name of Bell. He promised to take it.

Q. I am speaking of the Messrs. Kengla. Your answer to that would be that you never brought any claim to their attention prior to the filing of this suit?

A. Yes, sir.

Q. Do I understand you to say that the piece of property that was purchased by Mr. Hume from the Kenglas was the portion of this property that you claimed?

A. Yes, sir; it was a portion of the whole tract of land.

Q. Was not the object that Mr. Hume had in purchasing that piece of property that he might have an easy entrance to his property?

A. Well, I don't know whether he said expressly for his own benefit or not. I know it was for his benefit. It was for the benefit of all parties.

Q. And, therefore, when this sale was made to Mr. Hume the price that was paid would have been more than anybody else would have paid for it?

A. I think not.

Q. Then you say that the price paid for it by Mr. Hume was just its average value?

A. I think it was worth all that much.

45 Q. You have spoken of a piece selling for a thousand dollars an acre. Who was that sold by?

A. Mr. Jake Kengla.

Q. Will you state the circumstances under which that was sold,

if your property, which was so valuable, was only sold for $50 an acre?

A. Mr Kengla's was right on the road. It was sold, about 5 acres, at, I think, $1,000 an acre. It was 2½ at least. I remember that much.

Q. Do you know when that was?

A. Some time before the sale of my property.

Q. Now, how much did this property sell for at the sale to Mr. Kengla?

A. They bought it in for $50.00 an acre.

Q. Was it not sold for $1,000 and the assumption of a deed of trust of $2,000 on the property?

A. It was sold under a $300 deed of trust, subject to a claim——

Mr. MOULTON: Understand the question.

A. Well, it was sold under a $300 deed of trust for $3,000; it was bid in for $3,000.

(Mr. GORDON:)

Q. So, then, it really sold for $1,000 and the assumption of a $2,000 deed of trust, making $3,000 in all?

A. Yes.

Q. Who was the trustee under that deed of trust?

A. Mr. Joseph Weaver.

Q. Mr. Joseph Weaver was a man of very high standing in Georgetown, was he not?

A. Yes, sir.

Q. A man of the utmost integrity?

A. Yes, sir.

Q. Did you ever demand of Mr. Joseph Weaver an account of this sale?

A. I did not; I sent for him to make a time when I could see him. So I saw his son a little time before he died. I went over to town two or three times to see him. I stopped at the West market and asked his son if he would fix a time when I could see his father, when I could meet him over there, that I wanted to transact a little business about my property, and that is what my intentions were—to try to get him to pay this debt for me and helf me to redeem my property.

Q. You did not see him; you never asked him for an account?

A. No; the next thing I heard Mr. Weaver was dead.

Q. Do you know what year Mr. Weaver died in?

A. No.

Q. You do not know how long after this sale you asked for this interview?

A. It must have been about two years. I know I was working on chance work. I stopped to see him and could not, and I stopped one day and left word with his son.

46 Q. So, then, Mr. Levis, all the conversation you had with Mr. Kengla, either in the presence of Mr. Purcell or in the presence of anybody else, with reference to the right to redeem this

property, occurred before you left the property and just about the time of the sale?

A. They occurred with Mr. Kengla. The last conversation I had was before I left.

Q. How close to the sale?

A. Well, I know it was some time after. I could not say how long, because I was living in the city when he sent word for me to come over there that night.

Q. Now, Mr. Levis, let us understand that. When he sent for you you say you were living in the city?

A. Working in the city.

Q. Had you left the farm?

A. No, sir.

Q. How long after the sale was that?

A. Well, that was some months.

Q. How long—1, 2, 3, 4, 5, 10, 15 months?

A. 2, 3, or 4 months.

Q. And that was the last conversation you ever had?

A. The last I ever had with him.

Q. And that was in reference to the proposed conveyance of your interest to your wife and children?

A. Yes, sir.

Q. And from that time to this there has never been anything said. When you left that property who entered into possession of it?

A. Mr. Robert Kengla was working it.

Q. Entered into full possession, did he not?

A. Well, with the understanding that I was to have the right in there to have all over and above what he had on the property.

Q. Now, Mr. Levis, you are evidently not answering this question fairly. You have sworn positively over and over again that after the expiration of four months from the time of sale you never had a word with Mr. Kengla on the subject of redeeming this property, have you not? Have you not sworn to that?

A. I will tell you, Mr. Gordon——

Q. I object to any but a categorical answer to my question. You are under cross-examination, and must answer the questions put to you.

Mr. MOULTON: Now, Mr. Levis, with Mr. Gordon's permission, I will suggest that you ask the examiner to read that question to you again, listen to it carefully, and then answer it specifically.

The examiner thereupon read the preceding question to the witness again.

A. Well, to answer that, I have——

Mr. GORDON: I insist upon your answering the question
47 whether or not you have sworn that you never had a conversation with Mr. Kengla four months after the sale was made.

A. I have sworn I never had a conversation after four months;

I don't know exactly how long. It might have been four or five months.

Mr. GORDON: Well, I will change it to five months.

A. Well, no, sir——

Mr. MOULTON: Mr. Levis, hear the question, answer it plainly, and then if you want to make an explanation, do so.

The examiner, at the request of counsel, then read the question again. "Now, Mr. Levis, you are evidently not answering this question fairly. You have sworn positively over and over again that after the expiration of four (or five) months from the time of the sale you never had a word with Mr. Kengla on the subject of redeeming the property, have not you? Have you not sworn to that?"

A. I have sworn to that.

Q. So that when Mr. Kengla was let in possession of that property by you you had no talk with him about any agreement, had you, when you left there?

A. I had none after I left there.

Mr. MOULTON: Do you understand this question?

At the request of counsel the examiner read the question again.

A. No; not at the time I left there. The explanation is that Mr. Kengla had made this proposition with me that it should not be any hinderance in my recovering all over and above his debt before.

(By Mr. GORDON:)

Q. That agreement, then, was prior to the time of serving this notice upon you, was it not?

A. It was prior to that time.

Q. You say that since you left the property the Kenglas have not denied that the property belonged to you?

A. They have not.

Q. Have they ever at any time admitted that it belonged to you?

A. They did, I think, by giving me a right. Of course, I think it belonged to me the way they got it. I think when they made that agreement with me they admitted my right.

Q. Your remarkable way of answering the question necessitates my asking you another one. Do you mean to say that at any time after you left the property the Kenglas admitted to you your right to the property?

A. No.

Q. Do you mean to say that at any time after you left that property you claimed in the presence of the Kenglas that you had any interest in that property?

A. I did not before them.

Q. Do you remember a sale of the piece of property bought
48 by Hume from the Kenglas under the deed of trust given by the Kenglas to secure the payment of the deferred purchase-money on the land?

A. No; I never heard of it until after this suit was entered.

Q. You did hear of it after the suit?
A. Yes.
Q. But was it made before the suit was entered?
A. Yes.
Q. Do you remember what that b-ought?
A. About $1,400 or $1,500.
Mr. MOULTON: Don't guess at it.

(By Mr. GORDON:)

Q. Don't you know that it sold for $1,500? You say you heard it.
A. Yes, sir; I heard it.

Mr. MOULTON: I object to what he heard.

Redirect examination.

By Mr. MOULTON:

Q. Who purchased the property at the sale to which you have just referred?
A. I have heard that Mrs. Hume bought it.
Q. You were not present at the sale and had no personal knowledge whatever?
A. No personal knowledge whatever.
Q. When was it that you objected to this sale, before or after it occurred? I mean the original sale.
A. I objected to Mr. Weaver before the sale took place.
Q. Who else?
A. Mr. Robert Kengla.
Q. Who else?
A. Well, the rest of them that was there.

Mr. GORDON: All this objected to as merely reiterating what the witness has stated in his examination-in-chief.

(By Mr. MOULTON:)

Q. In answer to Mr. Gordon you said that you talked with Mr. Kengla after the sale took place. I want to ask you if you did not talk to him before.
A. Yes, sir; both before and after the sale. He said half a dozen times, "Phil, I want you to distinctly understand that I don't want anything more from it, only what I have on it."
Q. Then the trustee, Mr. Weaver, knew you objected to the sale?
A. He did.
Q. Did he know of your arrangement with Kengla?
A. He *sis*.
Q. Was he present and heard it?
A. He was.

49 Q. Mr. Gordon has invited your attention to the service of some notice upon you. Did you ever read any notice served upon you?
A. I don't think I did.

Q. Have you any distinct recollection of a notice being served on you?

A. I know it was either sent to my house or to my uncle's.

Q. Was it served on you in person?

A. No, sir.

Q. Then you never saw it?

A. No, sir.

Q. And did not know the contents of it?

A. No.

Q. And you don't know whether it was a notice to quit the premises or to buy a horse or what it was?

Mr. GORDON: All this objected to as leading and as an attempt to contradict his own witness's positive statement that he received a notice or knows that it was received, and that he had full notice that the Kenglas claimed the property.

A. I can't say I did, for I know I never received this notice.

(By Mr. MOULTON:)

Q. You never saw it?

A. I was ready to go when I heard of this notice.

Q. What family have you?

A. I have a wife and five children.

Q. What has been your financial condition since the sale down to the present time?

Mr. GORDON: All that is objected to. There is nobody in the room that does not understand that Mr. Levis is just like the rest of us. He is financially embarrassed.

A. Well, it could not have — worse to live. Mr. Gordon knows that from experience.

Mr. MOULTON: You mean he knows that from observation.

Q. Mr. Levis, what is your education?

A. Well, I have *a* got a common education.

Mr. MOULTON: That is all.

PHILIP LEVIS.

Sworn and subscribed to before me this eight- day of October, 1895.

CHARLES W. STETSON,
Examiner in Chancery.

EDWARD BROOKE, a witness called by and on behalf of the complainant, having been duly sworn, was examined—

By Mr. MOULTON:

Q. Give your name and residence.

A. Edward Brooke; residence, 32d St. extended or Tunlaw Town road.

50 Q. Are you acquainted with the plaintiff, Mr. Levis?

A. Yes, sir.

Q. And the defendants, the Kenglas?
A. Yes, sir.
Q. How long have you known Mr. Levis?
A. Ever since he was a child; all his life.
Q. Are you more or less familiar with the tract of land involved in this suit?
A. Yes, sir.
Q. Are you acquainted with the values of land in this vicinity in 1877?
A. I do not remember any about that, sir.
Q. Have you no idea of the value of land then?
A. No, sir; I do no- remember particularly about the value of land then.
Q. Do you remember about any loans made then?
A. I don't think I do.
Q. Where was the ground situated that you bought from your grandmother?
A. 22 or 23 years ago?
Q. Whenever it was.
A. It was a part of this tract.
Q. Have you bought any ground in that vicinity since then?
A. Yes, sir.
Q. How near the Levis tract and when?
A. Within a quarter of a mile.
Q. Further out or nearer in?
A. Nearer in town.
Q. When was that?
A. Well, the first time I bought property was about 15 or 18 years ago, probably?
Q. What did you pay then?
A. $1,000 an acre.
Q. Did you subsequently purchase all the ground around there?
A. Well, I lost that ground after buying it, and then I suppose 10 years ago I bought 2½ acres of the same ground for $1,000 an acre.
Q. At the time you bought the ground you refer to was that a fair marketable value for it?
A. Yes, sir; I judge it was.
Q. You thought so at the time, or you would not have purchased it?
A. Yes, sir; I thought it.
Q. Was that ground right on the road?
A. Yes, sir.
Q. Somewhat nearer town than the Levis land was?
A. Yes, sir.
Q. Have you not known of the selling of any ground around the Levis tract?
A. Not positively; I have not known of any. I have heard of a number of sales.
51 Q. Heard what the ground b-ought?
A. I know my father sold his property.

Q. What did that bring.
A. $25,000, I think.
Q. How much is that an acre?
A. I don't know, exactly.
Q. How many acres did he sell?
A. I don't know.
Q. How near was that?
A. That adjoined.
Q. Was there not 33 acres in that tract?
A. I would not like to say; but I think there was more.
Q. Your father's recollection would be better than yours?
A. Yes, sir.
Q. If he says 33 acres, that would in your judgment be correct?
A. Yes, sir.
Q. What do you know of the matter of an agreement between the Kenglas and Mr. Levis in relation to this ground?
A. I don't know anything positively.
Q. Did you ever have any talk with the Kenglas about it?
A. I have heard Robert Kengla say that he wanted Phillie to have what was coming to him, or rather that all he wanted to do was to get what belonged to him out of that property.
Q. Who did he mean by Phillie?
A. I don't know that he mentioned Phillie. I have heard Robert Kengla say that he did not want any more out of the property than belonged to him.
Q. What did you understand that to be?

Mr. GORDON: Objected to.

A. I don't know that I understood anything positively about it. It was about the time the place was sold, or near then.

(By Mr. MOULTON:)

Q. Do you remember where that was or who was present?
A. Indeed I do not.
Q. Do you have a distinct recollection about that?
A. I have of his saying that all he wanted was to get what was coming to him out of the property.
Q. Did he say anything about the balance?
A. Not a thing.
Q. Did he say anything about wanting Phillie to get anything out of it?
A. I don't think he did; don't think there was anything said about him.

Cross-examination.

By Mr. GORDON:

Q. Do you remember when it was, Mr. Brooke, that your father sold, about the time?
A. No, sir; not exactly.

52 Q. Do you remember about the date you bought the second time? I mean anywhere near it.
A. I think it was probably 9 or 10 years ago.
Q. That would be about 1885?
A. Yes, sir.
Q. How much nearer to town was your property than the property in question?
A. Well, from the road it was probably a quarter of a mile nearer.
Q. It was what would be considered more eligible property for subdivision, would it not?
A. I guess it would be.

Redirect examination.

By Mr. MOULTON:

Q. The conversation that you had with Mr. Kengla, was it before or after the sale?
A. Well, I don't know to a certainty, but I think it was after the sale that Mr. Kengla told me that all he wanted was to get his money out of the property. That is what I understand.
Q. That is what he told you?
A. Yes, sir.
Mr. GORDON: Was it before Levis had given up the property and moved away?
A. Well, I guess it was before he moved away, because I think it was soon after the sale.

EDWARD BROOKE.

Signed by the examiner for the witness with consent of counsel.
CHAS. W. STETSON, *Examiner.*

PHILIP L. BROOKE, a witness called by and on behalf of the complainant, having been duly sworn, was examined—

By Mr. MOULTON:

Q. Mr. Brooke, you are a resident of the District of Columbia, I believe?
A. Yes, sir.
Q. How long have you lived here?
A. I have lived in the District about 54 years.
Q. Where were you living about 1877?
A. I was living above Georgetown, nearly two miles.
Q. Are you acquainted with the plaintiff in this suit, Mr. Philip Levis?
A. Yes, sir.
Q. Know the defendants?
A. Yes, sir; I know them both.
Q. How long have you known the plaintiff?
A. Ever since he was born.
53 Q. Know his parents?
A. Yes, sir.

Q. You are more or less familiar with the land involved in this suit?

A. Yes, sir; more or less.

Q. How near did you reside to it?

A. Well, our house was, I suppose, a little over a quarter of a mile from it.

Q. Do you know the former owner of the property?

A. Yes, sir.

Q. Who was he?

A. How far would you like me to go back, sir?

Q. To his parents.

A. His grandmother was the original owner of the property.

Q. Please tell us how it came to her and what became of her estate.

A. Well, when I first came to the farm it contained 156 acres. My father-in-law and my mother-in-law were both living. They had, before the division was made, three children. This young man's father was one of the heirs. My wife was one of the heirs, and they had another son that died. I rented part of the place I lived on for a long time, and finally my family grew too large for the house we lived in. I was paying rent on a half of it, and I proposed to my mother-in-law that I would buy. There was then two heirs. One had died—that is, if she would divide the place and give me a deed for one-half I would give her a bond for $100 for her lifetime. I did not want to build a house on the undivided property. Mr. Levis agreed to it. I got a deed drawn up by Judge Cox for 78 acres, I think, and the other, I think, belonged to Levis' father. I don't know really how it was, if it was deeded to him or willed to him, only I got my share of it.

Q. There was originally, you say, how many acres in the tract?

A. 156.

Q. And you bought off something like 60?

A. We divided it in half—the father of this young man and myself.

Q. What became of the balance of it that is not involved in this suit?

A. There was 14 acres sold to Mr. Heiskell. There were some two or three acres sold to my son. All the rest remained there until Tunlaw road went through and cut off the balance.

Q. Do you know about the value of the ground there in 1877?

A. Well, it has not changed very much.

Q. Well, what was it then?

A. Well, there was not for a long time any land being sold in the neighborhood. Now, I made three small sales from my place.

Q. When was that?

A. One as much as 25 years ago. That was over an acre.

Q. What did you get for it?

54 A. $200. The next sale I made—I don't know whether it was for $200 or $250, and the next sale I made was to Hume or Pickerel. Mr. Hume made the bargain, but the proposed deed was given to Pickerel. Mr. Hume bought it.

Q. These two first sales—was the ground in those cases near this Levis property?

A. It was a part of the original tract.

Q. Then how much ground did you sell to Mr. Hume or Mr. Pickerel?

A. I think it was 18 acres of the ground, and then he paid me for one-half of the Tunlaw road. It was to clear the road that he bought and I sold.

Q. What kind of ground was this?

A. Well, there was, perhaps, three or four acres that was tilliable. The rest was flint stone and quarry. Perhaps four or five acres of it might be considered tillable.

Q. Then it was not considered very valuable ground?

A. No, sir.

Q. What did you get for that to Hume?

A. $100 an acre, sir.

Q. The front or the rear.

A. The rear.

Q. Do you know of any other sales of ground in that vicinity about that time?

A. I do not distinctly know.

Q. In your judgment what was the value of this tract of Mr. Levis's in the fall of 1877? Take this 60 acres that Mr. Philip Levis had, how much per acre would be a fair marketable value?

A. I think it would be worth $200 an acre, sir.

Q. Do you know anything about the trust incumbrances on the property?

A. Nothing but what I heard.

Q. You were present at the time of the attempted sale?

A. No, sir. It seemed a very quiet affair.

Q. What, if anything, do you know about that transaction?

A. Well, Judge, I don't know whether or not to state what I heard.

Mr. GORDON: Only what you can say of your own personal knowledge.

(By Mr. MOULTON:)

Q. Who did you hear it from?

A. Well, I must have heard of it from Mr. Clokey.

Q. Was he the man who held one of the deeds of trust—Mr. S. D. Clokey?

A. That's the name.

Q. Did that have relation to the value of the land?

A. I think not, sir.

Q. What was it about, sir?

A. He was a brother of my nephew's mother.

55 Q. That is, the plaintiff's mother?

A. Yes; and the lady—he was buying her lifetime right out, and I think he was anxious to get the money; and I think he (Clokey) negotiated the loan and got the money for him.

Q. That is, for Mr. Philip Levis. Do you know what he did with it?

A. I know he put a pump in and did a good deal of fencing.

Q. Do you know whether he obtained it for the purpose of buying his stepmother's interest?

A. Yes, sir; I know he did. I know her claim was satisfied.

Q. Are you acquainted with Mr. Rosenbush's farm?

A. Yes, sir; he adjoined ours.

Q. What is the relative value of the Levis tract of 60 acres as compared with your tract?

A. He was rather the best situation, sir. Mine was in a ravine laying low and further from the town.

Q. After these two or three sales to which you have referred, did you subsequently sell the balance of your land?

A. Yes, sir.

Q. How many acres?

A. 33.

Q. What did you get for that?

A. $25,000.

Q. What an acre?

A. About $500, I think.

Q. About $880. What do you suppose its present value is?

A. $1,000 an acre.

Q. What do you suppose the present value of the Levis tract is?

A. From what I have heard, sir, it would be worth over $1,000 an acre; if what I have heard is correct.

Q. About the time of this attempted sale or shortly after it (the attempted sale was in October, 1877), shortly after that, did you hear Philip Levis, the complainant in this suit, say anything about an arrangement for redeeming that property; and, if so, what.

Mr. GORDON: The question is objected to unless it is attempted to be shown that the conversation was in the presence of the Kenglas or subsequently reported to them by Mr. Brooke, and if introduced as substantiating any statements Levis may have made, certainly I don't think they are to be considered as pertinent.

Mr. MOULTON: I have already shown by one witness that Mr. Kengla stated to said witness that all he desired out of the property was the amount of his trusts. I expect farther to confirm that statement and further to show that the plaintiff's statements in regard to a verbal contract with the Kenglas were reported to this witness, and that such contract was acknowledged by the Kenglas.

Mr. GORDON: I object to that statement made in the presence of this witness in view of the fact that the witness was once before examined in this cause and distinctly disavowed any conversation with the Kenglas on the subject.

56 A. I heard him say substantially just what he has said this evening. He told me that Mr. Kengla, or Messrs. Kengla, I don't know which, had told him that he could dispose of the place himself or that they would dispose of it; that they did not want anything but satisfaction for their claim, and that he could have

all over and above it, and if they sold it they would turn all over after their claim and expenses. I heard Mr. Levis say he offered him a brick house to satisfy the claim. Now, the particulars of that claim of course I cannot give. That is about all I know.

Mr. GORDON: All that is objected to, and I give notice that I shall ask to have that stricken from the record and the deposition in that particular suppressed.

(By Mr. MOULTON:)

Q. Have you ever had any conversation with the Messrs. Kengla since this sale?

A. No, sir; never had any conversation with either of them with reference to the sale.

Q. You have had conversations with them?

A. Well, simply spoken to them, but never on this matter at all.

Q. You spoke about an attempt to trade that Mr. Levis had in view. Did you see the property?

A. No, sir.

Q. Did you not go down to the house and look at it?

A. No, sir.

Q. You don't remember that you ever did?

A. No, sir.

Q. Is there anything else in relation to this transaction that you know that would be of benefit either to the complainant or to the Kenglas? If so, please state it.

A. I don't think I know anything more about the value of the property.

Cross-examination.

By Mr. GORDON:

Q. Mr. Brooke, Mr. Levis is your nephew, and Mr. Edward Brooke, who just testified, is your son?

A. Yes, sir.

Q. You are both actually interested in this case, are you not?

A. I am not more interested that justice would take me. My conscience would not let me say anything but what was true to help any one.

Q. So it is entirely immaterial to you whether he is successful or not?

A. I don't know that I could say that, but I would not testify to anything that was not strictly true to help him.

Q. I would not have you believe that I think that you would testify to what was not correct, but nevertheless your interest is all with Mr. Levis, your nephew; naturally so.

57 A. Yes, sir; I suppose it might be so, but I would let my conscience govern me.

Q. Well, Mr. Brooke, you sold some of your property, did you not?

A. Yes, sir.

Q. Was there any market for land lying in the neighborhood of Mr. Levis's in 1877?

A. Well, there was not the same demand for land that there has been since. There did not seem to be many anxious to sell or to buy.

Q. Were there any purchasers out that way? Was the land being sold in large tracts as it is now?

A. No, sir.

Q. The sale of an acre of land at $100 an acre, country property, is very different from the sale of 20 or 30 acres?

A. Sometimes it might be.

Q. In your own experience do you not think it is easier to find a purchaser for one acre than for 20 or 30 acres?

A. Oh, yes, sir; plenty of men can raise $100 who can't raise any more.

Q. And when one acre is sold it is generally for some particular purpose?

A. Yes, sir.

Q. Do you remember in what year you made those sales you have referred to?

A. One about 1877, one farther back, one considerably later.

Q. You sold these for how much an acre?

A. The first acre for $200.

Q. The second?

A. $200 or $250.

Q. Who were these sold to, Mr. Brooke?

A. The first acre I sold for a public school-house.

Q. Who bought that, the District?

A. The District government.

Q. It was for the purpose of erecting a school-house?

A. Yes, sir.

Q. As a general thing the District government pays a little larger sums than private individuals?

A. Well, sir, I did not want to sell. I will explain that if you will let me.

Q. The question is, does not the District government pay a little more than private individuals?

A. Perhaps they do.

Q. Do you think you could have found a private individual who would have paid $200?

A. I found a private individual who paid me $250.

Q. How many years afterwards?

A. 10 years.

Q. And property was advancing a little in 10 years?

A. Well, the boom had not commenced then.

Q. What year was it, that, do you remember?

58 A. I don't remember. It was before the sudden rise was.

Q. Do you remember when the sudden rise was?

A. Yes, sir; it was about eight years ago.

Q. About 1887?

A. Land took its rise a year after Mr. Cleveland's election.

Q. So that the present value of land in that neighborhood is no criterion to judge of the value in 1887?

A. No, sir; land began to look up about 1887.

Q. You know nothing of your own personal knowledge of this alleged agreement between Mr. Levis and the Kenglas?

A. Nothing further than what has been stated.

Q. Mr. Hume and Mr. Pickerel bought a piece of property from you?

A. Yes, sir.

Q. The object of that was to complete a road into Mr. Pickerel's place, was it not?

A. Yes, sir; to run the road close by it.

Q. It was very desirable for the Tunlaw place that that road should be there, was it not?

A. Yes, sir; as much to him as to the others.

Q. And the reason that Mr. Hume was moved to buy it was that there might be a road there?

A. Yes, sir.

PHILIP L. BROOKE.

Signed by the examiner with consent of counsel.

CHAS. W. STETSON, *Examiner.*

TRANGOTT ROSENBUSH, a witness called by and on behalf of the complainant, having been duly sworn, was examined—

By Mr. MOULTON:

Q. Are you acquainted with the parties in this suit?

A. Yes; I know them.

Q. How long have you known Mr. Philip Levis?

A. I knew him when he was a little boy.

Q. About what is your age?

A. 75.

Q. How long have you lived in the District?

A. 56 years.

Q. What part of the District have you resided in?

A. The west.

Q. Near this property?

A. Next to Mr. Brooke.

Q. The former witness?

A. Yes, sir.

Q. Have you a tract of land of your own?

A. Yes, sir; I did own one; since then I have sold it.

Q. Were you living out there in 1877?

A. Yes, sir.

59 Q. How familiar are you with the tract of land involved in this suit?

A. Well, I know the land pretty well.

Q. Go by it often?

A. Yes; I go by there.

Q. A great many times?

A. Oh, yes; I passed by there often; almost every day.

Q. You were somewhat familiar with the values of real estate then, in the fall of 1877?

A. Well, if I should say it short, I bought some land from Mr. Brooke. I paid $225 per acre. There was but little sale made there then, but I should think Mr. Levis' land was worth about $200 an acre, because the land is more to the city than mine, and I paid $125 for mine way back in 1860.

Q. All your land is further out from the city than the Levis tract is, I understand?

A. Yes, sir.

Q. Which would be the more valuable land, then, in your judgment, the land further out or this of Levis's, nearer the city?

A. Nearer the city would be more valuable, I should think.

Q. And what do you think was the value of Mr. Levis' land in 1877?

A. I think it would be $200 an acre.

Q. Have you known of the sale of quite a good deal of property around there?

A. No; not in his time.

Q. Has a good deal been sold since?

A. Yes, sir.

Q. How have the prices ranged since that time?

Mr. GORDON: Objected to.

A. Well, since that time I sold for $800 an acre. If I waited a year longer, I could have got $1,200 or $1,500.

(By Mr. MOULTON:)

Q. At the time this property of Levis's was attempted to be sold in October, 1877, you think it was certainly worth $200 an acre?

A. Yes, sir.

Q. What knowledge, if any, have you of the arrangement between Mr. Levis and the Kenglas as to his right to settle up this matter?

A. I have not any knowledge; don't know anything about it.

Q. Did you have any conversation with Mr. Levis about it?

A. No, sir.

Q. Did you ever hear Mr. Kengla or either of them say anything about it?

A. No, sir.

60 Cross-examination.

By Mr. GORDON:

Q. How much land did you buy from Mr. Brooke?

A. I believe it was one acre or one acre and a half.

Q. And what did you use that for, may I inquire?

A. Well, I built a house on it.

Q. You purchased this piece of property for a particular purpose—that is, you bought it to live there?

A. Yes; I had got plenty of ground. This land lies a little higher up.

Q. You bought it to add to your own property, as it is more eligible for building purposes?

A. Yes, sir.

Q. And Mr. Brooke sold it to you for $250 an acre?

A. Yes, sir.

Q. In 1877 was this property of Mr. Levis's worth $200 and acre.

A. Yes, sir.

Q. Do you think it could possibly have sold for that price at a public auction as a whole?

A. Well, I could not say.

Q. Was there any sale for real estate in large tracts at that particular time?

A. No, sir.

Q. In fact, there was no property selling around there?

A. No, sir.

Q. And while the property might be worth $250 an acre in the opinion of the owner or the neighbors, it certainly would not have found a purchaser at public sale at that price?

A. No; there was no great call for land in that part of the District then.

Q. The call did not commence for eight or nine years afterward and property then rose rapidly?

A. Yes, sir.

Mr. GORDON: That is all.

TRANGOTT ROSENBUSH.

Signed for the witness by the examiner with consent of counsel.

CHARLES W. STETSON,
Examiner in Chancery.

The parties thereupon adjourned to meet again Tuesday, February 19th, at two o'clock p. m., at the same place.

WASHINGTON, D. C.,
TUESDAY, *February 19th*, 1895—one o'clock p. m.

The parties met, pursuant to adjournment, at the office of Mr. H. B. Moulton, No. 1003 F St. N. W.

Present: The same parties as at previous session.

61 Whereupon J. R. PURCELL, a witness called by and on behalf of the complainant, being duly sworn, was examined—

By Mr. MOULTON:

Q. Mr. Purcell, where is your place of residence?

A. I am now living at Gainesville, Va.

Q. What was your business about 1875 to 1880?

A. Previous to 1875 and along there I was a farmer; handled a great many cattle. During that time, also, 1875, '76, and '77, I was a member of the Va. legislature.

Q. Do you know Mr. Levis, the complainant in this suit?
A. Yes, sir.
Q. Are you acquainted with the Kenglas?
A. Yes, sir.
Q. How long have you known them?
A. I have known the Kenglas ever since the first transaction I had in the cattle business, immediately after the war, say 1866.
Q. How long have you known Mr. Levis?
A. I have known him ever since he became a butcher. I suppose he was then a young man, a married man.
Q. Did you have any dealings with Mr. Levis along about 1876 or 1877?
A. Yes, sir; from the time he made his first commencement. I may possibly—may have sold him some of the first cattle he bought when he commenced working for himself.
Q. Do you remember the circumstances of this attempted sale of Mr. Levis's property?
A. Yes, sir; I was familiar with that; am familiar with it.
Q. Were you present at that time?
A. Yes, sir.
Q. How did you happen to go out there?
A. Well, sir; he owed me a bill for cattle. I went out there to see him.
Q. Was Mr. Levis at the sale?
A. Yes, sir.
Q. The Kengla boys there?
A. Yes, sir; I remember George and Robert Kengla both being there.
Q. What conversation did you hear or what fact did you ascertain while there at the sale in relation to the condition upon which this property was sold, if any?
A. Well, sir, being there in my own interest, trying to collect my debt—Mr. Downing, I think, the auctioneer, had his red flag out there, and I had supposed that the property would bring a great deal more than I had understood was claimed, and I expected to be able to get out the surplus my claim, and that there would be much more besides. The sale hung fire; either there were too few parties present, and they seemed to — interested parties.
Q. Any bidders?
A. No outside parties as bidders that I know of, sir.
Q. Go ahead.
62 A. After remaining there considerable time, no bidders being present, there was some arrangement entered into between Levis and the Kenglas by which the property was either cried out—was supposedly turned over to the Kenglas. I remember that just before this transaction took place I heard a conversation between Mr. Hume, who owned the property adjacent to this, and the interested parties.
Q. Who?
A. Between Mr. Hume——
Q. And whom?

A. The interested parties, the Kenglas—the substance of which conversation was that while he was not bidding on the property that he desired to take that part of the property which was cut off by the road leading to his farm, then named Tunlaw. I remember also going over there perhaps with Mr. Levis and Mr. Robert Kengla. I remember now the transaction and the conversation that happened.

Q. What was it?

A. In substance it was that Mr. Kengla did not desire, and, indeed, he so stated to me up there—he did not desire the land; only wanted his money out of it, and he wished to impress upon Mr. Levis during our walk from there that he only would act as a friend to his interest in this matter. That is the substance of it. I would not undertake to quote verbatim.

Q. What do you mean by a friend to his interest?

A. Well, I mean this: that after he had gotten his money out——

Mr. GORDON: I object to this. If this witness could state what Mr. Kengla said, if anything, I would have no objection to it; but I certainly object to his stating his deductions, his conclusions, and his interpretation of a transaction which took place 15 years ago. I want what was said and nothing else.

(Mr. MOULTON:)

Q. State what you mean by a friend to his interest; how Mr. Kengla explained it at the time.

Mr. GORDON: I object to that also for the same reason.

A. Well, his explanation was exactly the conversation that I have stated—that he only wanted his money out of it, and any proceeds beyond that Mr. Levis and his family would get the benefit of. There was an arrangement entered into between Mr. Kengla—the two Kenglas—Mr. George Kengla, who was the older, and Mr. Robert Kengla. They were partners also. There was an arrangement entered into between them and Hume. Hume was not a bidder, though he desired a portion of the land that was cut off by this Tunlaw road. Just at this moment I want to say, because my memory is good upon that point, and being a party who thought he had some interest in that property himself, Mr. Hume did not bid upon this property because between Mr. Levis, the Kenglas,
63 and Hume the arrangement was made by which Hume would get all he wanted out of that land.

(By Mr. MOULTON:)

Q. This statement that you say that the Kenglas or one of them made after you left the sale was that, or the sum and substance of it, made in your hearing on the ground before you left the place?

A. Yes, sir; in substance it was.

Q. By which one of the Kenglas or both of them?

A. By Mr. George Kengla in the presence of Mr. Robert Kengla; that is my recollection of it at this time.

Q. Was the trustee, Mr. Weaver, present at that time?

A. Mr. Joseph Weaver was present.

Q. Do you remember whether his son was present at that conversation or not?

A. I am not absolutely certain. The parties were grouped around there. There were very few of us there, but I can't say whether he was one.

Q. Now, you say you went there because you had a claim against Mr. Levis. Your object in attending the sale was, as far as possible, to protect your own interest?

A. Yes, sir.

Q. And at the sale you learned that it had under this arrangement been bid in by the Kenglas. Please state to the examiner whether you ever saw the Kenglas afterwards and had any talk with them in regard to it.

A. Yes, sir; I had talks with them repeatedly after that. I was trying to get my money out of it.

Q. Did they in any of these conversations declare or disclaim that Mr. Levis did not have a claim in this property?

A. No, sir; I did not understand any such thing.

Q. Never made any such statement to you?

A. Never made such statement to me.

Q. Did they at any time give you any encouragement as to the probability of getting your bill on Mr. Levis from the property?

A. I am unable to say that they did at this time. My mind has not been directed to that point at all. I can't recollect so that I could make a statement on that point.

Q. But you did see them many times in relation to it?

A. Yes, sir; the impression made upon my mind was——

Mr. GORDON: I object to this witness giving his impressions, as he has stated that he does not recollect any promises made of any kind, and therefore such impression would be merely the visionary imaginings of his own brain, which I object to.

A. The impression made upon me was that Messrs. Kengla, in this whole transaction, were standing as between Mr. Levis and myself and other creditors, and the Kenglas told me at various times afterward that after they got their money out of the transaction, then I would stand a chance of getting mine; therefore the impression made upon my mind was that they were acting as
64 protective to Levis and preventing any of the other parties from getting a lien on this property. They said when they got their money out, then Mr. Levis would have an opportunity to pay what he owed me.

Q. One or both of the Kenglas told you that?

A. Well, sir, generally the same statement from one or both of them. I knew them all well.

Q. Do you remember when you had your last conversation with them in relation to it?

A. Well, sir; the very last conversation I had—I had repeated conversations as long as I thought there was any hope or expecta-

tion of getting my money. It extended considerable period after that supposed sale up there.

Q. Two or three years?

A. I could not say. I would not like to make a statement unless I was confident about it. In fact, I talked about all of these things as long as I was in the cattle business.

Q. When did you go out of the cattle business?

A. Well, perhaps in 1889. I ceased to sell any cattle in this market and I went out of the cattle business a year or so after they introduced this Armour business here.

Q. Then, according to your best recollection you were trying to collect this bill some six or eight years after this attempted sale to the Kenglas?

A. Yes, sir; I tried to the very last limit.

Q. At no time during any of these interviews did they ever suggest to you that Mr. Levis did not have any interest in the land?

A. No, sir; they never made any suggestions in regard to that whatever.

Q. Then, as I understand you, you heard the Kenglas make these statements on the ground at the time of the sale, and thereafter you walked away from the ground where the attempted sale had taken place and walked in company with one of the Kenglas and Mr. Levis. and as you walked along this matter was discussed by Mr. Kengla in your presence and that of Mr. Levis, and the same statements that had been made on the ground at the time of the sale were reiterated several times as you went down as far as Mr. Levis' house, and even down there the matter was talked of?

Mr. GORDON: The question is objected to as entirely improper in form. If the witness has sworn to these things it is unnecessary for counsel to reiterate them. The statements speak for themselves. Besides, I do not think he has stated all that counsel has injected into his question.

A. Well, in substance the same thing was reiterated. I will not extend my answer at all.

(By Mr. MOULTON:)

Q. And that thereafter during the lapse of time that you have mentioned, so often as you had an opportunity, the matter
65 was discussed and admitted by the Kenglas during the series of years that followed down to the time you went out of the cattle business, as I understand it?

Mr. GORDON: Objected to for the same reason.

A. Yes, sir.

(By Mr. MOULTON:)

Q. Do you remember to have heard either of the Kenglas say that in case they sold the Levis property for an amount in excess of the amount due them, what should be done with the surplus?

Mr. GORDON: That is objected to as leading and suggestive.

A. If you ask me the question of what I know that the Kenglas said in regard to the surplus I will answer it.

(By Mr. MOULTON:)

Q. That is what I desire.

A. They said they only wanted their money out of it and the rest could go to the benefit of this man, Levis.

Cross-examination.

By Mr. GORDON:

Q. You were present at the sale, of course. Do you remember when that was?

A. No, sir; I would not state positively.

Q. Can you form an idea of how many years back that was?

A. My impression is, sir, that it was between 17 and 18 years.

Q. There was an auctioneer present, was there not?

A. Yes, sir; had his red flag.

Q. And the bell was rung?

A. I would not be positive, but presumably.

Q. And you heard the auctioneer cry the property?

A. Yes, sir; he offered the property.

Q. Did he not knock down the property to Mr. Kengla for $1,000 and the assumption of a deed of trust that existed on the property?

A. There was a consultation.

Q. I am not asking you about a consultation.

A. Well, sir, at this date I am absolutely unable to say whether that property was knocked down or not.

Q. Then, if Mr. Levis swears that the property was sold to Messrs. Kengla, you do not mean to contradict that statement at all? You only cannot say; you do not remember?

A. Well, I just let her go as I have stated.

Q. Did you not know as a matter of fact that the property had been sold and knocked down by the auctioneer to the Kengla Brothers?

A. I still adhere to my statement.

Q. Will you please answer my question?

66 A. I have already answered it already in my previous answer.

Q. Will you please answer my question? (To the examiner:) Take down my question and the witness's re-lies, Mr. Stetson, so that they may go into the record.

At request of counsel the examiner read the previous question to the witness again.

A. I have already just stated that I do not remember positively whether that property was ever knocked down.

Q. Then, if the property had not been sold by the auctioneer to the Kengla Brothers, why was it that the Kengla Brothers in your

presence made the statement that they did not desire to get out—the property any more than was owing to them?

A. Well, sir, I am not arguing this case and I don't want to make a hypothesis.

Q. Then you did not know the property had been sold to them at all and you do not know it now?

A. I stated that I could not remember positively or not whether the property was knocked down to the Kengla Brothers or not.

Q. Well, I have asked you the question not whether it was knocked down, but whether you did not know the property had been sold to them by the auctioneer.

A. Well, sir, to answer that question as I knew and believed, was that Mr. Kengla was taking this property for his own interest and to protect Mr. Levis.

Q. I will ask you the question once more. When you left that ground were you under the impression or not that the property had been sold to the Kengla Brothers at that attempted sale, as you call it?

A. Then I shall have to give you my impressions. The impression that I was under was that Mr. Hume would take all that part of the land that was cut off by that road and Mr. Levis would receive the benefit and credit of the amount he paid upon that portion of the land, and that he would be able to redeem his property by paying whatever was due to the Kenglas.

Mr. GORDON: Now we will have to adjourn this session and carry this deposition to the court and get an order compelling this witness to answer this plain question.

Mr. MOULTON: Mr. Examiner, I suggest that you read over the last two or three questions and answers to the witness.

This was done by the examiner.

Mr. GORDON: Now, Mr. Purcell, your answer has been read to you. You can readily see that you have not answered my question. My question is whether when you left the ground you were or were not under the impression that the property had been sold to the Kenglas and not to Mr. Hume.

A. I was under the impression that a *bona fide* sale had not been made.

Q. You were under the impression that a *bona fide* sale had not been made. Now, will you tell us what you derived that impression from?

67 A. It is all there. I have stated in the testimony. I have stated all I saw and heard.

Q. Do you mean to say, Mr. Purcell, that Mr. Hume was present at the time of that sale?

A. That is my impression, sir. I took it to be Mr. Hume. I heard the conversation. I was not personally acquainted with Mr. Hume, but I heard the conversation and the gentleman stated that he would take that portion of the land.

Q. Do you remember the appearance of the man you thought was Hume?

A. Yes, sir; a good stout man like his brother, who was a candidate for Congress.

Q. And therefore you are willing to swear that Mr. Hume was present at the time of that sale?

A. I am willing to swear that it was stated that it was Mr. Hume.

Q. Who stated that to you?

A. Well, in general conversation a man does not take those things into his mind. I was thoroughly satisfied that it was Mr. Hume. It was impressed upon my memory because I was an interested party.

Q. And you mean to say that at that sale Mr. Hume was present and Mr. Hume talked with the Kenglas in reference to the purchase of a portion of that property?

A. Yes, sir.

Q. Do you remember how much he said he would give for it?

A. Not positively.

Q. Do you remember what the property was sold to the Kenglas for, if was sold at all?

A. I would not state.

Q. Did you hear any conversation between Mr. Levis and Mr. Kengla in reference to the amount that was due upon that property?

A. Mr. George Kengla stated that he had either $100 or $200 interest in it, and all he wanted out of it was his money.

Q. He told you there was $100 or $200 due on it, and that was all he wanted?

A. Well, that was to him. Him and Robert Kengla had a partnership business.

Q. Now, sir, when was that conversation—how soon after the sale?

A. Well, sir, it was maintained. The same statement was continued all along as I was trying to collect my money.

Q. Do I understand you to say that after this sale took place in October, 1877, after October, 1878—at any time—either one of the Kenglas told you or admitted to you or intimated to you that Levis had any interest in that property?

A. Well, sir, I will answer that question. I cannot remember the dates positively, but I will answer the question in this way, that the Kenglas intimated to me and said to me in substance that all they wanted to get was their money out of the property.

Q. Yes, sir; you have told us that several times. Now, I
68 will ask you if after October, 1878, they made any such statement to you or intimated that Levis had any interest in that property.

A. Well, the reason that I don't answer that question is simply my inability to give exact dates.

Q. Well, you cannot remember that they did after October, 1878?

A. No; I do not see that I could make a statement of that kind. I would not make any statement that I was not absolutely certain of.

Q. I understand that. What did Mr. Levis say when Mr. Hume was there talking?

A. Well, sir, I don't know that I would be able to quote him now—his verbatim statements at that time.

Q. He was there at the time?

A. Yes, sir.

Q. And was present at this conversation between Hume and Kengla?

A. Mr. Levis, when they were fixing to sell this property, he was there present, and he stated, to the best of my memory now, that there were no bidders there; the sale hung fire, and there was no prospect of any conclusion whatever until this gentleman, whom I *I* have referred to as Mr. Hume, came upon the scene. I heard the conversation between him and the Kenglas, and heard him say that he desired that part of the land that was to be cut off by that road.

Q. Did Mr. Levis hear that?

A. Well, sir, he is a better witness as to whether he heard that than I am.

Q. Are you able to say whether he was sufficiently near these parties to hea.· or not?

A. I don't think it would be right for me to make such a statement upon memory.

Q. All your statements are made upon memory.

A. It is impossible for any human being to tell what a man hears.

Q. If I were standing next to you would you not be cognizant of the fact that I could hear a conversation between two persons beside you?

A. You could if you were not paying attention to something else so that you did not hear.

Q. Was Mr. Levis' attention so directed, as far as your recollection goes, that he could not hear that conversation?

A. I would not state anything of the kind. I was an interested party.

Q. How much was your claim?

A. My recollection is that it was $150.

Q. When did you last see Mr. Kengla in reference to your claim?

A. I would not be able to tell you, but I saw them repeatedly.

Q. Was it after 1879, do you think?

A. My impression is, sir, that I had conversations with these gentlemen several years after this transaction.

69 Q. In what year was the last one, do you think?

A. Dates is something I have avoided giving in my testimony.

Q. Was it as late as 1880?

A. I would not state.

Q. As late as 1879?

A. Well, sir, I am not able to state. Dates are very difficult for me to recall without I have something to go on.

Q. Then you will not swear that either in 1878 or 1879 or after that you approached these gentlemen on that subject?

A. To the best of my memory, sir, I talked with these gentlemen in regard to my claim as to the Levis property two, three, or four years after, or perhaps more. As long as I had any hopes of collecting that claim I talked with these gentlemen; generally with George Kengla.

Q. Why did your hope vanish with reference to this claim?

A. Why, "Hope deferred maketh the heart sick," and every butcher here that owed me $1,000 went back on me, and finally when they introduced the Armour business here I had to go out of the business.

Q. Had they promised at any time that they would pay you?

A. No, sir; they never assumed the debt.

Q. Had they promised that they would see that Levis paid you?

A. The only hope extended to me was that when they got their money out of it I would stand a show to get mine.

Q. Now, as a matter of fact, was not the only hope you had based upon the conversation that you heard these parties have at the time the sale took place?

A. No, sir; I had very high hopes based upon things that transpired long after the sale.

Q. What were those?

A. Why, that there was a probability of selling this property at an advanced price, and that all they wanted was to get their money out, and that then there would be enough left over for me to come in on.

Q. Do you mean to say that at any time after October, 1877, or within two months after that date that either of the Kenglas told you that when that property was sold Mr. Levis would have an interest in the proceeds?

A. As that question is put I cannot answer that they did; in the language that is put in.

Mr. MOULTON: Put in any explanation you have to make.

Mr. GORDON: I object to any suggestions on the part of counsel during my cross-examination. I think I am having difficulty enough without assistance.

Redirect examination.

By Mr. MOULTON:

Q. Do you desire to add anything to your answer to the last question?

70 Mr. GORDON: I object to the question. In its form it is suggestive to the witness, who has not stated that he desires to make any explanation.

The WITNESS: I desire to make an explanation. (To the examiner:) Read that last question over to me again.

The examiner read the last question over again.

The WITNESS: The language of the gentleman is the reason I make a failure to answer that question.

Mr. MOULTON: Will you be kind enough to answer the balance of his question?

A. Well, I think I can state that at a time after two months had elapsed that the Kenglas created the impression with me that if that property was sold for a greater price than the money that they had in it that Mr. Levis or his family should have the benefit of it.

Mr. MOULTON: That is all.

J. R. PURCELL.

Signed for the witness by the examiner with consent of counsel.
CHAS. W. STETSON, *Examiner.*

The parties thereupon adjourned to meet again upon notice by complainant's counsel.

WASHINGTON, D. C.,
THURSDAY, *April 11th*, 1895—3.30 p. m.

The parties met, pursuant to notice, at the office of H. B. Moulton.
Present on behalf of the complainant, Mr. Moulton.
Present on behalf of the defendant, Mr. Gordon.
Present also, Mr. Levis.

Whereupon O. C. GREEN, a witness called by and on behalf of the complainant, having been first duly sworn, was examined—

By Mr. MOULTON:

Q. Mr. Green, you are a resident of the District of Columbia, I believe, and have been for many years?

A. Yes, sir; born and raised here.

Q. What is your business?

A. Real-estate agent.

Q. Been that for many years?

A. I have been in that business, especially as a real-estate agent, since 1874. I was in it really two years before that.

Q. Do you know Mr. Levis here?

A. I knew Mr. Levis' father very well and I know him.

Q. Do you know where his father lived in the country?

A. Very well.

Q. Did you live in the vicinity of it at any time?

A. Yes, sir; I lived there; was born near there. (The witness answered after having had Mr. Levis describe the property in question, its location, &c.)

71 Q. Are you familiar with the location of the property involved in this suit, which has been described to you by Mr. Levis?

A. I am.

Q. Were you somewhat familiar with the value of property in that vicinity in 1877 or 1878?

A. Yes.

Q. Was your general knowledge of the values of property there such as to enable you to form a fair judgment of the value of this particular piece of property?

A. I think so.

Q. Will you be kind enough to state, in your judgment, what the value of this land was per acre at that time—in the fall 1877?

A. I don't exactly know the lay of the land and all and I am not certain whether the present house was on it or not. (To Mr. Levis:) Was it? The house that Kengla lived in when he died. (Mr. Levis: No, sir.) Yes, sir; I think I remember the property pretty well.

Q. Will you be kind enough to state what you think the land was worth, with the improvements, per acre at that time?

A. It would be a very hard matter to say. I can only give it by what property in the neighborhood sold for previously and subsequently to it.

Q. Well, state what that was, if you will.

A. The nearest piece of property to it on the south, which was bought several years before—I mean by several probably ten years or possibly a little more—was the property belonging to Jacob Kengla and bought at $50 an acre. That is what you call the Tunlaw Heights. Then behind this property to the north and west of it was a piece of land which I understand, but don't know from my own personal knowledge, a piece of land of about 100 acres, which sold for about $5,000.

Q. When was that?

A. I could not give you the date.

A. Along in 1877 or 1878?

A. I think it was a little before that; subsequently to that I don't know of any property that sold in the neighborhood until I sold to Mr. Whitney the Gaston property for $300 an acre, and that has a front on the Tennaleytown road and a front on the Loughboro road, and a very desirable piece of property. This particular piece of property of Levis's was badly situated. It was right behind a row of slaughter-houses and the Tunlaw road was not made then. There was no ingress or egress from it, except a little lane which we used to call the Magazine road—a narrow road not over 12 or 14 feet wide. It was very hard to sell the property.

Q. Did you see Mr. Levis a week or ten days ago?

A. Yes, sir.

Q. Do you recollect what you said about the value of this property then?

A. I recollect that I said to him then pretty much what I
72 say now. There was no sale of property then but two acres down by Major Nichols'.

Q. What did that bring?

A. That nominally brought $1,000 an acre, but they did not ever get that for it; no such sum was ever paid for it. As I told Mr. Levis, there was no sales made at that time.

Q. Do you know of the sale of Mr. Brooks' property there?

A. Where Mr. Philip Brooks lived?

Q. Yes, sir.

A. No; I always thought he got that as having married one of the heirs.

Q. Do you know of his having sold that land since then?

A. Yes, sir; for a large figure, I believe.

Q. Do you know what?

A. No, sir; a large price; a thousand or more an acre.

Q. This tract that you say you were offered $300 an acre for, when was that sold?

A. That was in the second year of Mr. Cleveland's administration.

Q. And what did it bring?

A. There was just 100 acres and that brought $30,000.

Q. What was that subsequently sold for?

A. The front lots on the Tennal-ytown road for $1,500 an acre. I never knew what the balance sold for. When I spoke of the front lots there was one-third of the property that brought $1,500 an acre. I sold the Cleveland property after Mr. Whitney had bought the Loughboro or Means property. I sold that for my brother—26 acres for $21,000, improved by a comfortable stone house—but that was in 1885 or 1886, I believe.

Q. That was in the decided boom?

A. Yes, sir; subsequently he sold for $135,000.

Q. Now, Mr. Brooks has testified that about the time of the sale of this property he sold some of his property for $200 or $250 an acre. Do you know anything of that sale?

A. I do not. I don't know what piece of ground that was.

Q. Do you know Mr. Rosenbush?

A. Yes, sir.

Q. I think Mr. Rosenbush has testified that he sold some of his ground to the District for $200 or $250 an acre. Do you know of that?

A. No. Mr. Rosenbush, when I first knew him, lived on the Tennallytown road, where I live now.

Q. Then, it has been shown in testimony that the rear part or the hilly, stony part, of this Levis land was sold to one Hume for $100 an acre at the time of this auction?

Mr. GORDON: That is objected to in view of the fact that it has not been shown that it was at the time of this sale. It was a considerable time afterwards. It was two years afterwards.

The WITNESS: I heard about that sale. Mr. Hume bought it so as to open Tunlaw road.

73 (Mr. MOULTON:)

Q. Mr. Levis, when talking with you a week or so ago, got the impression, erroneously or in some way, that your judgment was that the ground was worth at the time of this sale about $200 or $250 an acre?

A. I did not mean to convey that impression. I repeated to Mr. Levis, when he asked me, exactly as I have sworn to here about the different sales in the neighborhood, but did not fix any value

on his property. I spoke to him about the Busey property that was sold for $200 an acre on the Woodley road, but that was several years afterward. That is the tract of land now owned by Frank Newlands.

Cross-examination.

By Mr. GORDON:

Q. Mr. Green, I understand you to say that this particular piece of property was badly located with reference to exit, ingress, &c.

A. At that time it was ungetatable property.

Q. Was that property, so far as its availability for subdivision purposes is concerned, in any way equal to the other pieces of property that you have mentioned as being sold?

A. At that time the only way to get to it was through a narrow lane, say, 15 feet wide; that was then the only way of getting in or out of it; subsequently Mr. Hume opened the Tunlaw road, which gave it a long frontage on the south and west.

Q. Mr. Green, as a matter of fact was that property marketable at that time to the general purchaser?

A. There was nothing doing in real estate at the time.

Q. Do you remember the date of sale to Mr. Whitney?

A. I can only tell by the fact that it was the first year after he was made Secretary?

Q. That was after Mr. Cleveland's first inauguration?

A. Yes, sir.

Q. Was not that property which Secretary Whitney bought one of the most desirable pieces of property in the neighborhood?

A. Yes, sir; it had a very long front on the Tennallytown road and a front on the Loughboro road.

Q. So that it was capable of subdivision, if the parties so desired?

A. Yes, sir.

Q. You have spoken of the property subsequently sold to Mr. Cleveland. That was a portion of the old Rosedale property?

A. Yes, sir.

Q. You say that with reference to roads that it fronted on the Woodley road and on the Tunlaw road?

A. 700 feet on one and 300 feet on the other.

Q. The Whitney sale was the beginning of the boom for that section?

A. Yes, sir.

Q. And the rise from that time on was great?

74 A. Phenomenal.

Q. What is the marketable value of property in that neighborhood now as compared with the marketable value of property there three years ago?

A. I could not tell. Mr. Cleveland sold the property he had for $5,000. I sold what I considered as good property for my sister for $3,000 an acre awhile ago.

Q. It was in the same neighborhood?

A. Adjoining neighborhood.

Q. So there has been ever since the sale of Mr. Cleveland's property a shrinkage of $\frac{2}{3}$ in value?

A. This tract was a much larger tract of land.

Q. This piece of property of your sister's, was that available for subdivision purposes?

A. It has been made so.

Q. This piece of property that was sold to Mr. Hume, that has been spoken of, you say that was necessary to Mr. Hume in order——

A. (Interrupting.) I don't say it was necessary. Mr. Hume said so.

Q. What was his object in purchasing it?

A. To open Tunlaw road.

Mr. MOULTON: Do you object, Mr. Gordon, to my offering in evidence the certificate of the assessor showing the assessed value of the Levis property in 1877?

Mr. GORDON: In order to obviate the necessity of having Mr. Trimble, the collector, bring the books of the office into court, counsel for the defendant admits that Mr. Trimble will swear to the information contained in his letter.

The statement of the assessor was marked by the examiner P. L., Exhibit No. —.

By consent of counsel the examiner has signed the testimony of Mr. O. C. Green.

CHAS. W. STETSON,
For O. C. Green.

EXHIBIT P. L. No. —.

OFFICE OF THE ASSESSOR, DISTRICT OF COLUMBIA,
WASHINGTON, *March 29th*, 1895.

H. B. Moulton, Esq., att'y-at-law, city:

The records of this office show that in 1877 60½ acres on the Georgetown and Rockville pike were assessed in the name of Philip Levis; value of land, $1,840; value of improvements, $800.

Very respectfully, MATTHEW TRIMBLE,
Assessor D. C. [SEAL.]

(G. A. H.)

The complainant thereupon announced his testimony closed.

75 *Testimony on Behalf of the Defendant-.*

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
vs.
GEORGE M. KENGLA *et al.* } In Equity. No. 14634, Docket No. —.

WASHINGTON, D. C.,
THURSDAY, *May 9th*, 1895—three o'clock p. m.

The parties met, pursuant to notice, at the office of J. Holdsworth Gordon, Esq., #330 Four-and-a-half street N. W.

Present on behalf of the complainant, H. B. Moulton.

Present on behalf of the defendant-, J. Holdsworth Gordon.

Whereupon THOMAS DOWLING, a witness of lawful age, called by and on behalf of the defendant-, having been duly sworn, was examined—

By Mr. GORDON:

Q. Mr. Dowling, will you state your business?

A. Auctioneer.

Q. How long have you been in that business?

A. A long time; I guess 35 years.

Q. You sell land here?

A. All over the District; everywhere.

Q. Do you keep any memoranda of the sales made by you?

A. I do.

Q. Have you any book showing any memoranda of sales made by you as far back as 1877?

A. I have.

Q. I believe I requested you to look in your books and see if you could find anything referring to a sale said to have been made on October 29th, 1877, of some property belonging to Philip Levis. Have you made an investigation of that matter?

A. I have.

Q. Have you found anything?

A. I have a record of the sale.

Q. I wish you would turn to that record and tell us what book it is in.

A. A book from among my records of property sales made in the District of Columbia since I was in Washington.

Q. You say since you were in Washington; formerly you were in Georgetown?

A. Yes, sir.

Q. Will you turn to that entry, if there is such an entry, and will you state what the entry in your book shows?

A. Sale to George M. Kengla and brother for $1,000, subject to a trust of $2,000.

76 Q. Will you state if there is anything showing what property it was and if it was sold?

A. Here is the advertisement *on* public auction of tract of land situated in the county of Washington, District of Columbia, being on that portion of the Alliance tract conveyed by Walter Smith to Agnes Levis.

Q. Now, is there any memoranda showing anything paid in reference to that sale?

A. Only the charges for the sale.

Q. Will you state what that entry is?

A. Commission, $26; bell, $1; advertisement, $33, making a total of $60.

Mr. GORDON: I would like to offer in evidence a copy of the entry made in Mr. Dowling's book with the understanding that the original can be produced on the argument if desired.

The examiner marked the paper so offered in evidence T. D., Exhibit A.

Q. Do you have any independent recollection of that sale except what is mentioned in the book there?

A. I do not. It is too far back.

Q. Mr. Dowling, suppose, during a sale, objection is made to the sale or anything unusual occurs, do you make a note of that in your book?

A. We do. We have instances here. I expect I can turn to them (handing counsel the book). There is one.

Q. What do you do in a case of that sort, Mr. Dowling?

A. Generally make a record of it.

Q. And do you find any such record in that entry with regard to this sale?

A. No.

Q. That being your usual custom, to make an entry when objection was made, what would that lead you to suppose in reference to that property?

A. Well, I do not think there was anything said.

Q. Mr. Dowling, can you tell us whether the parties complied with the terms of the sale so far as the auction sale is concerned?

A. So far as the sale fees were concerned, they did.

Q. You don't remember anything else about the sale?

A. No.

Q. You never heard anything else about the sale since?

A. No; not until I heard from Mr. Levis here a while ago.

Cross-examination:

By Mr. MOULTON:

Q. Mr. Dowling, I understand you to say that you have no independent recollection of this transaction at all, and the only guide in your testimony is the record of this little book?

A. Yes, sir.

77 Q. You say that you heard no complaint from Mr. Levis in relation to the sale until recently?

A. He was over talking to me.

Q. Did you see Mr. Levis at all until recently?

A. Not that I know of.

Q. Now, if a complaint had been made by Mr. Levis to Mr. Kengla, the beneficiary under the deed of trust, not in your presence, you would not have known it?

Mr. GORDON: I object to that because it is self-evident.

A. No, sir.

By Mr. MOULTON:

Q. If any arrangement had been made between Messrs. Levis and Kengla in relation to the sale, you would know nothing about it unless communicated to you?

A. I don't think I would, sir.

Q. And have no recollection of any communication being made to you at the time in relation to it?

A. I have not.

Q. Do you remember, independently of your book, who bid on the property?

A. I do not.

Q. Do you remember, independently of your book, how many bids were made on the property?

A. I do not.

Q. In other words, you have no recollection of it whatever?

A. No, sir.

Q. You state, I believe, that when objections were made to sales you should enter them on your book?

A. Yes, sir.

Q. Will you glance at this book and see if you can find any that were noted prior to this sale?

Mr. GORDON to the examiner: Mr. Dowling turns to his book and exhibits place where request is made for change in terms of the deed of sale, request being by grantor in the deed of trust.

Mr. MOULTON: The counsel for the complainant desires to call the attention of Mr. Gordon to the fact that that entry relates to matter transpiring some time after the sale. It is not an objection to the sale at the time the sale was made.

At the request of counsel the examiner read the previous question to the witness.

A. I do not.

Q. Now, do you find any objection made to the sale after the date of this transaction: and, if so, how soon after?

A. I may not find one in this book. I will see. (After examining the book:) No, sir.

Q. What period of time is covered by this book?

A. The first sale is June 4th, 1875.

78 Q. And the last sale?
A. Was March 28th, 1878.
Q. And during these years, then, you find no record of any exception made?
A. I have not seen any.

(By Mr. GORDON:)

Q. The memoranda of expenses are the expenses that you gave to the trustee?
A. Yes, sir.

(By Mr. GORDON:)

Q. They were paid you?
A. O, yes, sir; no doubt about that.

THOMAS DOWLING.

By consent of counsel the examiner signed the foregoing testimony of the witness.

PHILIP LEVIS, the complainant, having been called as a witness, was examined—

By Mr. GORDON:

Q. Mr. Levis, you spoke in your examination-in-chief of a Dr. Triplett; do you remember what his first name was?
A. I don't know.
Q. Can you remember whether it was Dr. Wm. A. Triplett?
A. I don't remember his first name.
Q. Do you know whether he was a practicing physician?
A. He was at that time.
Q. Do you know where his office was?
A. 11th and F streets. It was on F, the second door on the left.
Q. The property that you spoke of as offered by him in this proposed exchange was located, you have said, on Capitol Hill. Do you know on what part of Capitol Hill?
A. I know it was about the second or third square the other side of the Capitol. I think it was on an avenue; I think Maryland avenue.
Q. Was it on Delaware or Maryland avenue?
A. It ran right into the Capitol.
Q. Was it near the corner?
A. No; I think it was several doors from the corner.
Q. Do you remember how it was improved?
A. It was a two-story house—I think there was 8 rooms—and then a big vacant lot along the side of it.
Q. Were you ever in the house?
A. I don't know.
Q, Was it a frame or a brick house?
A. Mr. Gordon, I cannot say positively.
Q. You have seen the house?
A. I have seen it.

79 Q. Was it not a frame house?
A. That I cannot say positively.
Q. Do you know whether Dr. Triplett is still alive?
A. I have heard that he is dead.

PHILIP LEVIS.

Subscribed and sworn to before me this eighth day of October, 1895.

CHARLES W. STETSON,
Examiner in Chancery.

CHARLES ROBERT KENGLA, one of the defendants in this case, *one of the defendants in this case*, having been duly sworn, was examined—

By Mr. GORDON:

Q. Mr. Kengla, you are one of the defendants in this case, are you not?
A. Yes, sir.
Q. What was your brother's name?
A. George M. Kengla.
Q. He was a codefendant with you?
A. Yes, sir.
Q. He died some time since?
A. Yes, sir.
Q. Mr. Kengla, did you at any time have a deed of trust upon the property in dispute in these proceedings?
A. Yes, sir.
Q. How many deed- of trust? Did you have more than one?
A. Two, sir.
Q. Do you remember a sale being made under any of these deeds of trust?
A. Yes, sir.
Q. Do you remember the date of that sale?
A. I think it was 29th October, 1877.
Q. Why was that sale made?
A. Well, the notes came to maturity and we never received any interest and could not get any, and we was forced to sell.
Q. Do you remember the amount of that note?
A. $300.
Q. Did you hold any other note of Mr. Levis' secured by the deed of trust on this property?
A. Yes, sir.
Q. How much was that?
A. $2,000.
Q. Do you remember the date of that note?
A. I don't know as I do, sir. It was dated in 1873, I think.
Q. But you held the note?
A. Yes, sir.
Q. Had there been any interest paid on either of these notes since they were issued by Mr. Levis?

80 A. No, sir.

Q. Do you remember the trustee under this deed?

A. Joseph Weaver.

Q. Is he now living?

A. No, sir.

Q. Can you say how many years after the sale took place he died?

A. I suppose 7 or 8 years.

Q. But he did live some time after that sale?

A. Yes, sir.

Q. Were you present at the sale?

A. Yes, sir.

Q. And was your brother present?

A. Yes, sir.

Q. Was Mr. Levis present?

A. Yes, sir.

Q. Do you remember whether you complied with the terms of sale as specified by the advertisement and as given you by the trustee?

Mr. MOULTON: Objected to as leading.

A. Yes, sir.

(By Mr. GORDON:)

Q. Did you or did you not pay all that was demanded of you by the trustee?

Mr. MOULTON: Same objection.

A. Yes, sir.

(By Mr. GORDON:)

Q. Was the deed of that property made to you and your brother?

Mr. MOULTON: Same objection.

A. Yes, sir.

(By Mr. GORDON:)

Q. Can you state how long after the sale before the deed was made to you?

A. Well, I could not say exactly, but I suppose it might have been six weeks or two months.

Q. Mr. Levis has testified that at that sale he objected to a sale being made, and imparted that objection to you personally. Will you state whether any such objection was made to you or not?

Mr. MOULTON: Same objection.

A. Not to my knowledge, sir. He did not.

(By Mr. GORDON:)

Q. Will you state if any arrangement of any kind was made between you and Mr. Levis after the sale of that property had been made; and, if so, what?

81 A. There was, sir.

Q. Now, will you state just exactly what occurred?

A. Mr. Levis thought the place did not bring as much as it ought to. We told him we didn't want anything but what was right, and that the place had brought all it would bring; but to show him that we did not want anything more than right we gave him time to sell it, to sell the property, and if he could get more for it, all over that he got he could have. We called the trustee up and we asked him what he thought we ought to give him (Levis). The trustee thought that a week would do.

Mr. MOULTON: Objected to.

The WITNESS (continuing): Then we extended him a little longer, and we agreed on two weeks.

Q. Well, was anything done under that agreement?

A. I don't know, sir, whether there was or not, but Levis told me that he had a trade with some Dr. Triplett which I didn't know his Christian name; I suppose Wm. H. Triplett, but I could not say. I know his name was Dr. Triplett.

(By Mr. GORDON:)

Q. What did he say about that sale?

A. Well, they didn't come to time in about two weeks, and then Mr. Levis stated that that would go and we allowed it to run along for a while for them to come; they didn't. Mr. Levis often, 3 or 4 times, told me that they was coming up, but they never came. I went to see Dr. Triplett at his office.

Q. Where was that?

A. On F street.

Q. Well, what did he say about it?

A. I asked him if he intended to take the property, and he said no.

Mr. MOULTON: Objection is made to anything that Dr. Triplett said.

The WITNESS: He said he could not raise the money and could not take it.

(By Mr. GORDON:)

Q. Mr. Levis has testified, if I remember correctly, that Dr. Triplett went to you and that you told him there was no way of getting out from this place, and that that prevented his buying the property. Did any such conversation take place between you and Dr. Triplett?

A. No, sir.

Q. Well, how long did Mr. Levis continue on that farm?

A. I don't know; he lived on it a year.

Q. Well, was that after you got your deed?

A. We told him he could live there for the winter. I don't know how long he was there, but he stayed there until we had to notify him to leave.

Q. Then you did give him notice to leave?

A. Yes, sir.

82 Q. What was the result of that notice?

A. Well, he left.

Q. Who took charge of the property then?

A. We did.

Q. Do you know how long after the sale that was?

A. Well, it was near about a year; I suppose about 9 months; I could not say exactly.

Q. Has Mr. Levis been in the occupation of that farm at any time since he left under this notice?

A. No, sir.

Q. Who was it paid the taxes on that property?

A. We have, sir.

Q. Who has kept it in repair?

A. We have, sir.

Q. Has Mr. Levis at any time until the filing of this suit demanded the property of you?

A. No, sir.

Q. You don't remember his being present?

A. No, sir.

Q. Do you remember walking away from the sale with Levis and Purcell?

A. No, sir.

Q. Do you remember where you went after the sale?

A. No, sir; don't know more than that I went home.

Q. Do you remember whether you were out there in your buggy or not?

A. No, sir; I walked home.

Q. How far from your home was this place and that of Mr. Levis?

A. I suppose about 400 or 500 yards.

Q. Were you nearer to Georgetown than he?

A. About the same distance—that is, we were nearer by taking the road up in a direct line. I don't believe there was any difference.

Q. Well, now, on leaving the sale and going towards your home, would you leave Mr. Levis or would you go in the direction of his house?

A. Left his property.

Q. So that if you went off with him from the sale he must have walked away from his house?

A. Yes, sir.

Q. Mr. Purcell has testified that frequently—on some occasions, at least—after the sale was made you intimated to him that there was an interest held in that property still by Mr. Levis. Will you state whether any such intimation was given by you or if you have had any conversations with him in reference to any supposed interest of Mr. Levis?

A. No, sir.

Q. Do you remember when you last saw Purcell?

A. I saw him, as far as my judgment leads me—I suppose it has been, about 4 months ago.

83 Q. Did you have any talk with him then on the subject?

A. No, sir; I met him at the American house on 7th street. We had a few words about something else, but nothing in relation to the property.

Q. Mr. Levis has testified that on one occasion you desired to put some compost on the farm and went to him to obtain his permission to do it. Will you state whether any such thing occurred?

A. Never did.

Q. Since you went into possession of that property have you and your brother exercised entire control over the same or have you had any joint interest with anybody else?

A. No, sir.

Q. Mr. Levis has testified that during the sale Mr. Thomas L. Hume spoke to you in regard to the purchase of a portion of the land which would enable him to have an exit from his farm, Tunlaw. Will you state whether any such conversation occurred in your presence?

A. No, sir.

Q. You did finally, I believe, sell some of that property to Mr. Hume?

A. Yes, sir.

Q. How long after the sale was that?

A. I don't really know; I think nearly two years.

Q. Can you state how long after the sale to you under this deed of trust it was that Hume first mentioned the subject of buying a portion of that land to you?

A. I think it was near about two years, to the best of my judgment.

Q. Was that the first intimation you had from Hume of his desire to purchase?

A. Yes, sir.

Q. Was not the fact of your selling to Mr. Hume generally known in that neighborhood, among the neighbors there?

A. Yes, sir.

Q. When that sale was made did Mr. Levis come to you and demand any portion of the money?

A. No, sir.

Q. Did he ever ask an account?

A. No, sir.

Q. Did you or did you not ever make any agreement with Mr. Levis that you would hold this property, and that if at any time the property was sold for an amount over and above the claims against it under the two deeds of trust that the balance would be given to him other than the arrangement which you have stated giving him the chance to resell within two weeks?

A. I did not, sir.

Q. When was the first time that you heard of any claim being made by Mr. Levis on this property after you received your deed in 1878?

A. After we had sold the property to Mr. Warner, Mr. Fickling notified me that Mr. Levis had laid a restraint on the sale of it.

84 Q. You mean a restraining order had been issued by the court to prevent the sale?

A. Yes, sir.

Q. And that was the first intimation you had in all these years?

A. Yes, sir.

Cross-examination.

By Mr. MOULTON:

Q. Mr. Kengla, have you any distinct recollection of what occurred at the time of this sale?

A. Well, what do you mean, sir, about what occurred?

Q. Have you any distinct recollection, so that you could tell all that occurred at the time of this sale?

A. I don't know as I could tell all. I will tell you as near as I can.

Q. I suppose after the lapse of years you scarcely remember all that was said so you could repeat it?

A. Very hard, sir, for any man to do.

Q. Now, you were present at the sale?

A. Yes, sir.

Q. Levis was there, your brother was there, the auctioneer, Captain Purcell, and Mr. Weaver were there?

A. Yes, sir; as near as I can recollect.

Q. Do you remember anybody else?

A. I could not remember the people that was there.

Q. Can you name anybody else that was there?

A. No; I don't think I can.

Q. So that at the present time you are unable to mention any other than those I have called to your attention?

A. Yes, sir.

Q. Did you hear all the conversation that took place on that occasion between your brother and Mr. Levis?

A. Could not say I did, sir. I remember a part of the conversation about the two weeks. Any other conversation that took place I don't know anything about.

Q. So that the only conversation with Mr. Kengla that you remember is the conversation having relation to the two weeks?

A. Yes, sir.

Q. You cannot recollect any other conversation that Mr. Levis had with your brother, nor can you recollect any other conversation that Mr. Levis had with you?

A. No, sir.

Q. Nor can you recall any conversation that you had with Mr. Purcell?

A. Never had any with him that I know of, sir; could not recollect if I did.

Q. You do remember a conversation with Mr. Levis about
85 the matter of the conveyance and the holding the property up a length of time subject to his control and disposal?

A. About the two-weeks matter? Yes, sir; that was to wait for Dr. Triplett to come up with his money.

Q. As I understood, Mr. Kengla, that transpired at the sale long before Dr. Triplett was heard of—this conversation about the two weeks?

A. That was the day of the sale, sir; just after.

Q. But that was long before Dr. Triplett was heard from?

A. O, yes, sir.

Q. So that you did not make that arrangement specially for Dr. Triplett?

A. No, sir; open to any one.

Q. And from the time of the sale down to the expiration of these two weeks you were to hold the matter still open, the property subject to be conveyed to any person that Mr. Levis might find that would pay off his indebtedness and take the property?

A. Yes, sir.

Q. All you wanted was your money?

A. Yes, sir.

Q. You so stated to Mr. Levis?

A. Yes, sir.

Q. Had you not so stated to Mr. Levis before the sale?

A. Might be.

Q. Don't you remember going to him before the sale and telling him that all you wanted was your interest?

A. I might, but I can't recollect.

Q. Then if you can't recollect whether anything of the kind was said or not, if Mr. Levis states that you did so state, of course you can't contradict him?

Mr. GORDON: I object to that question for the simple reason that Mr. Levis has never pretended to say that some days prior to this sale any agreement was made between Mr. Kengla and himself. What he may say hereafter I don't pretend to know.

A. I would not know how to answer that; if I did state anything like that, it would be that I told him all I wanted was my money.

(By Mr. MOULTON:)

Q. Have you stated all the conversations that transpired on the premises at the time of the sale—before the sale was actually made—that you can remember?

A. As near as I can, sir.

Q. There is nothing else that you now remember that was stated by yourself or any other person?

A. No, sir.

Q. Have you stated all that you can remember of the conversation between you and Mr. Levis or the conversation between yourself, Mr. Levis, and Capt. Purcell, if there was any conversation, after the sale was made on the same day?

86 A. Well, I had no conversation with Captain Purcell that I know of in regard to the property, anything more than I

might have talked to him in some way, but I didn't say anything to him about the property.

Q. Then if Mr. Levis testifies that prior to the sale he approached you and notified you that there were no bidders present and that the sale could not be made, you have no recollection of any such conversation?

Mr. GORDON: That question is objected to for the simple reason that it is improper in form. Mr. Moulton has a right to ask this witness if any such thing occurred, and that is as far as he can possibly go.

A. No, sir.

(By Mr. MOULTON:)

Q. And if he testifies that you asked him to let the sale go on and that you would hold the property subject to his direction and that he should have all *of* said property could be sold for except the amount due you and that you only desired the amount due you, you don't now recollect said conversation, do you?

A. Never said anything of the sort, sir.

Q. Then you certainly have no recollection of any such statement?

Mr. GORDON: Well, all this is objected to as argumentative.

(By Mr. MOULTON:)

Q. If Capt. Purcell testifies that he heard such conversation or agreement between yourself and Mr. Levis before the sale, do you think he was mistaken, then?

A. Yes, sir; I think he was mistaken.

Q. Then if Mr. Levis and Capt. Purcell both so testify, you think they are mistaken?

Mr. GORDON: This line of questioning being so clearly incompetent, I feel it my duty to make an objection that the court may see that I am not permitting the questions to be asked under the impression that they are according to law.

(By Mr. MOULTON:)

Q. And if they both testify that after the sale they walked from the premises in company with you and that you several times repeated the same statement do you think they are both mistaken?

A. Yes, sir.

Q. You have no recollection of any such conversation?

A. I have not, sir.

Q. The only agreement that you remember to have made with Mr. Levis, as I understand you, is that of extending the right to sell said property and retain all that he could derive therefrom after paying your indebtedness? That is the only agreement that you remember to have made with him?

87 A. That is all, sir.

Q. Do you remember Mr. Levis prior to the sale calling your attention to the fact that there were no bidders present?

A. No, sir.

Q. Do you remember when you obtained your deed to this property?

A. I don't know as I do. I think it was in January.

Q. The January following?

A. Yes, sir; I really don't know the time; I could not state.

Q. If your agreement with Mr. Levis was limited to two weeks only, why did you wait three months before you obtained your deed?

A. Well, I don't know any more than we allowed the time to run on and found out that Dr. Triplett did not intend to come and take the property, and then we had the deed made out in our name.

Q. Is it not a fact that the trustee, Mr. Weaver, refused to convey the property, knowing the arrangement made at the time of the sale?

A. No, sir; he never did.

Q. Did you ever have any conversation with him about conveying it?

A. No, sir.

Q. Do you know who did? Was it your brother who did?

A. All I know about the conveyance is that I went to him and told him to have the deed made up to us; that Dr. Triplett did not intend to take it.

Q. Then you do remember that you did have some conversation with him? Do you remember when that was?

A. No, sir; except that it was after we found out that they was not going to take the property and then we went to him.

Q. When you say we do you mean you and your brother?

A. Yes, sir; I have been in the habit of speaking that way.

Q. I notice in your answers to Mr. Gordon that you state we. In those statements where you used the word we were the statements made by you and your brother?

A. Well, in some of them they may have been made by both of us and some by myself.

Q. How long after the sale was it that Mr. Levis told you he had sold it to Dr. Triplett?

A. I think it was within about two weeks.

Q. Why was it that you went to see Dr. Triplett?

A. I suppose it was—I could not say exactly, but I suppose it might have been a month. They told me he was coming up with payments, but he never came, so I went to see him.

Q. I think Levis testified that Dr. Triplett went to see either yourself or your brother. You say he never went to see you, so that if he did it was your brother that he saw?

A. Yes, sir.

Q. Do you remember whether or not Dr. Triplett called upon yourself and brother in the market in relation to it?

A. I do not, sir.

88 Q. Do you remember when Mr. Levis left the place?
A. I do not, sir.
Q. Did you ever hand him yourself any notice to quit the premises?
A. No, sir.
Q. Did you ever see any one else hand him a notice to quit?

Mr. GORDON: All this is objected to, as Mr. Levis in his answer and his testimony has admitted that he received the notice and left as soon as the notice was given.

Mr. MOULTON: I must correct Mr. Gordon in the matter of the testimony. Mr. Levis stated that he heard notice was given when he left there.

Q. Before Mr. Levis left there, were you ever over to his house?
A. I don't know as I was, sir.
Q. Did you see Mrs. Levis or have any talk with her?
A. I did not.
Q. You have met Mrs. Levis?
A. I have seen her at the house.
Q. Do you remember when you saw her at the house?
A. No, sir.
Q. Do you remember whether you saw her at the house after the sale?
A. O, yes; I have gone over there and seen her about the house.
Q. How many times?
A. I could not remember.
Q. About half a dozen?
A. I reckon it was, sir.
Q. Do you remember having a conversation with her stating to her that you would like to see her husband?
A. No, sir.
Q. Do you remember asking her to ask her husband to come over and see you?
A. No, sir.
Q. I suppose, in fact, you don't remember what the conversation was between yourself and the lady?
A. I don't know as I ever had any; no more than to speak with her. I passed her by and spoke to her.
Q. Do you remember what month Mr. Levis left the farm?
A. No, sir.
Q. Do you remember to have seen him at your house a short time before he left the farm?
A. No, sir.
Q. Do you remember any conversation with him in your house in relation to this property, a short time before he left?
A. I do not, sir; might have, but I don't know.
Q. What was Capt. Purcell's relation to the matter?
A. I don't know.
Q. Did you know he was a creditor of Mr. Levis?
A. No, sir.
Q. When did you find that out?

89 A. After he gave his testimony in here.

Q. Capt. Purcell testified, if I recollect correctly, that he had many conversations with you about this (Levis') property. What is your recollection of it?

A. He did not have any at all, sir. I don't remember having any.

Q. And he says, if I remember correctly, that in reference to these conversations he obtained the impression from you that Mr. Levis had an interest in the property?

A. Well, he obtained the wrong impression.

Q. But you cannot now remember any conversation that you had with Capt. Purcell in relation to it?

A. No, sir.

Q. What was Capt. Purcell's business?

A. I believe he was a drover.

Q. Did you deal with him?

A. I don't remember dealing with him personally because my brother went to the yard and did the buying.

Q. I think he testified that he had dealings with your firm?

A. Very likely.

Q. And in that way had come to know both of you very well. I understood him to say that he very frequently visited your place of business.

A. I don't recollect Captain Purcell ever being in my house.

Q. I said place of business.

A. Oh, yes; he might have done so. He came to the market. The drovers generally stop to have a little word with the dealers.

Q. I think he testified that he talked either with yourself or your brother with reference to his account against Mr. Levis and his desire to collect it. Do you remember any such conversation?

A. I do not. I don't know that we had any such.

Q. Do you remember telling Mr. Levis upon one occasion, when he was at your house and before he left the farm, that Capt. Purcell was watching around for the purpose of collecting the claim made out against him for this property?

A. I do not, sir.

Q. Mr. Levis testifies that you sent for him to come to your house before he left the farm and expressed to him a desire to convey his interest in it for the benefit of his wife and children. Do you remember that conversation?

A. I do not; never had any such.

Q. And Mr. Purcell testified, as I recollect it, that you expressed the same desire to him. Do you remember that?

A. No, sir; never did.

Q. So that these gentlemen must be mistaken in all that?

A. Yes, sir.

Q. Do you remember on the day of the sale on the premises, just before the sale, asking Mr. Levis if he could raise $100 or $150 for you?

A. No, sir.

90 Q. Do you remember whether or not you went away from the sale in company with Mr. Levis and Captain Purcell?

A. No, sir.

Q. Do you remember what road you took going home from the sale?

A. I think I went right across the fields, as near as I could.

Q. The question was, Do you remember?

Mr. GORDON: He has answered it.

By Mr. MOULTON:

Q. Do you remember, Mr. Kengla, that you walked through the fields?

Mr. GORDON: I object to this kind of questioning. He has answered three times fully and fairly the question of counsel. What more does he want?

Mr. MOULTON: I desire to suggest on the record that I wish not the impression of the witness, but his recollection, if he has any. Mr. Kengla, what I desire is your recollection, if you have any, of the road you took when you left the sale to go to your home. If you have no recollection, of course you cannot state; but if you have, I desire your recollection.

Mr. GORDON: My answer to that is that this gentleman has answered this question three times, and that in the absence of the court to prevent the counsel from continuing and keep him within limit I say to my client that he need not answer the question, and counsel can go to the court and get his redress if he wishes it.

At the request of the counsel for the complainant the examiner read the question to the witness.

The witness refused to answer.

(By Mr. MOULTON:)

Q. Which direction did you live at this time from Mr. Levis' house?

A. His place from my home?

A. Yes.

A. I lived near about east, sir.

Q. Would that be in a direction towards the city or otherwise?

A. No, sir.

Q. Or towards the road leading towards or — otherwise?

A. Well, it would be on the road leading towards the city. I live right on the road and he lived right back of it.

Q. Would it not be one of the ordinary routes for Capt. Purcell to take—that is, by your home—to return to the city?

A. Well, it would be about the only way to go through the lane that leads out there near our house; that is the only way he could have gone.

Q. Do you remember whether or not Mr. Levis walked along with you gentlemen?

Mr. GORDON: Mr. Levis all the time going away from his home.

91 A. I don't remember.

Q. When did you make the sale to Mr. Warder?

A. I don't remember the date, sir; near on to about two years. I could find the date from Mr. Fickling, who was our agent. He had the selling of it. I could get it from him.

Q. How much of this land was sold to Mr. Hume?

A. Near about 27 acres; a little over, I think, sir.

Q. And for that you got what?

A. $100 an acre.

Q. How much land were you selling to Mr. Warder?

A. Well, I intended selling—I believe there was 60 acres in the tract, and we gave the road through, which took two acres or so off, and the balance was sold to Warder.

Q. For how much were you selling the balance of it to Mr. Warder?

A. Mr. GORDON: That is objected to as immaterial. The present value of it or what he was offered for it has nothing whatever to do with the issue in this case.

A. We sold it at $2,000 an acre.

(By Mr. MOULTON:)

Q. A total of how much for this particular piece?

A. Well, we were selling two pieces of property, sir; we were selling a piece of property that had buildings on it, a nice slaughter-house and nice stable.

Q. The property involved in this suit was about 30 acres, I believe, so that the price for which the tract was being sold to Warder was about $60,000?

A. Well, that was about the price, but it was the other part that made it sell, the part that had the improvements upon it.

Q. Was not the Levis property improved?

A. Had a barracks upon it.

Q. Was there not a dwelling place and a barn upon it?

A. Not on that property; it was burned down.

Q. There had been such improvements, but they had burned down?

A. Yes; there was an old house on it when we got the place; there was a little log house, but we could not get any insurance upon it at all.

Q. The improvements consisted of the dwelling-house, the barns, and outhouses, at the time of the sale?

A. There was no barn on it; there was a little cow shed.

Q. The other improvements?

A. There was no improvements only a little log house that we pulled down; that was two rooms, as near as I can recollect.

Q. Is it not true, Mr. Kengla, that a large portion of this $2,000 was used in improving the dwelling-house, and that the dwelling-house so improved was there at the time you purchased the place?

A. I don't know, sir; but I don't think there was any improvements at all about the house.

92 Q. I understand you to say, Mr. Kengla, that you have no recollection of asking Mr. Levis about putting composite on this land or having any conversation with him on the subject?

A. No, sir.

Q. Did you put any composite on the land?

A. Oh, yes, sir.

Q. How long was this after this proceeding of October?

A. I could not say here; it was during the year.

Q. Before he left the place?

A. Oh, yes, sir.

Q. Then you saw him frequently?

A. I saw him occasionally; yes, sir.

Q. As I understand you, Mr. Kengla, the amount represented by these two deeds of trust was $2,300, with interest to be added. Is that correct?

A. Yes, sir.

Q. Then I understand you to testify that you sold 27 acres or something over 27 acres to Mr. Hume for more than $2,700?

A. I guess you are right, sir.

Q. Was not that sufficient to pay off your entire indebtedness?

Mr. GORDON: I object to that on the ground that the statement itself shows, according to Mr. Moulton, that the debt was $2,300, and that the sale was something over $2,700, and it is assuming that the property was the property of Mr. Levis, which this defendant has denied, and also because he assumes that there was an indebtedness of Mr. Levis existing at that time to which this sum should be applied, which is also denied.

A. I really don't know how to answer it. I have never summed it up.

(By Mr. MOULTON:)

Q. What is your best knowledge in relation to it? Was it or was it not?

A. Well, there was no indebtedness on the place that I know of. If there was, I don't know of it, sir.

Q. No part of my question makes any statement in relation to a place. I simply ask you if the $2,700 and 80-odd dollars derived from the sale to Hume was not sufficient to entirely pay off the two notes for $2,000 and $300 respectively held by yourself and brother.

Mr. GORDON: Now, that is objected to on the ground that it is immaterial whether it was sufficient to pay off the indebtedness that had existed, which was liquidated by the sale of that property, or not. No indebtedness existed at that time, whatever Levis owed having been paid by the sale of the real estate and the assumption of a part of the debt by Mr. Kengla.

The WITNESS: Near about a tie. I would not know how to answer it.

(By Mr. MOULTON:)

Q. Do you remember at any time to have given Mr. Levis a statement of the sale of October 29th, 1877?

93 Mr. GORDON: That is objected to on the ground that it was not the place of Mr. Kengla to give him any statement, Mr. Levis having distinctly stated in his examination that he demanded none of the trustee. It is immaterial, therefore.

A. I do not remember of ever giving him any.

(By Mr. MOULTON:)

Q. Have you ever up to the present moment surrendered or delivered to Mr. Levis either the $2,000 note or the $300 note?

A. I don't remember of ever giving them up to him.

Q. Do you know where said two notes now are?

A. I do not, sir.

Q. Are they not still in your possession or under your control?

A. They may be for all I know, sir.

Q. If I remember correctly, Mr. Levis and Capt. Purcell both testify that Mr. Hume was negotiating for the purchase of the 27 acres of land immediately after October, 1877. Is that your recollection about it?

A. I don't remember. He never negotiated with me about it at that time.

Q. The remaining portion of this tract, perhaps about 30 acres, is still held at the present time by yourself and the codefendants in this suit?

A. Yes, sir.

Q. Do you remember prior to this sale when you called upon Mr. Levis, urging him to pay you some money, that he advised you that Hume was negotiating for a part of the tract and asked you to wait until he could make a sale?

A. Don't remember of any such conversation, sir; never had any such.

Q. This conversation, my client advises me, occurred in front of his house and he was cutting grass at the time you came to the premises.

A. Don't remember about it, sir.

Q. Do you remember to have paid out any money on account of this transaction of October 29, 1877, except the $60 paid to Mr. Dowling?

A. I complied with the sale, whatever it was.

Q. Well, can you examine your records or in any way advise me whether you paid out anything other than the $60 to Mr. Dowling?

A. It has been so long I can't remember.

Q. You have no way of ascertaining?

A. No, sir.

Q. Nor have you any recollection of anything else that you paid?

A. No, sir.

Q. Will you state to the examiner what amount, if any, you have paid on account of taxes?

A. I could not, sir; I could not state how much I have paid.

94 Q. Have you paid them for the present year?

A. No, sir.

Q. Have you paid them for last year?

A. Yes, sir.

Redirect examination.

By Mr. GORDON:

Q. Why have you not paid the taxes for the present year?

A. Because I have this whole month to pay them in.

Q. Mr. Kengla, you have stated that you do not recollect having had any conversation with Mr. Purcell in regard to a supposed claim on the part of Levis against this property. Do you mean to say that you have no recollection of any such conversation or do you mean to say that you never had any such conversation?

A. I never had; saying "I don't remember" is a kind of way I have got into of answering.

Q. You have paid all the taxes except this year?

A. Yes, sir.

Q. How much taxes has Mr. Levis offered to refund to you so far?

A. None at all.

Q. If Mr. Levis had told you that Mr. Hume proposed to buy 27 acres of that property for $2,700 and had offered to pay that to you towards the liquidation of the indebtedness on the property, would that property have been sold by you under the deed of trust?

A. No, sir.

Q. Did Mr. Levis at any time tell you that Mr. Hume proposed to buy a portion of that property from him and ask you to wait for the sale?

A. No, sir.

Q. Has Mr. Levis ever demanded of you any accounting in this matter?

A. No, sir,

Q. Did he ever demand of you a return of any papers of any kind?

—. ——.

Q. Did you settle with the trustee for this matter?

A. Yes, sir.

Q. Mr. Dowling has mentioned a small account for his commissions, the advertisement, and the bell which was paid. Do you know whether anything was paid to Mr. Weaver for his trustee's commissions?

A. It is all settled.

Q. You paid him?

A. Yes, sir.

95 Recross-examination.

By Mr. MOULTON:

Q. Do you remember to have paid Mr. Weaver anything?
A. Yes, sir.
Q. What amount?
A. I don't remember now.
Q. Do you remember where you paid him?
A. Well, it was paid through Mr. Cassin.

CHARLES R. KENGLA.

Subscribed and sworn to before me this second day of July, 1895.

CHARLES W. STETSON,
Examiner in Chancery.

Mr. GORDON: In order to avoid the necessity of bringing Mr. Trimble up here to testify, I want to offer in evidence this certificate as to the property appearing on the tax records for 1876, 1877, and 1878 in the name of William H. Triplett.

The examiner marked the certificate so offered in evidence C. R. K., Exhibit No. 2.

EXHIBIT C. R. K. No. 2.

WASHINGTON, D. C., *May 9th*, 1895.

I hereby certify that the following property appears upon the tax books of the District of Columbia in the name of William H. Triplett for the years named, and that no other property appears in his name for the dates specified except that herein set forth. I also certify that the value of said property as herein set forth is as stated upon the said assessment books for said District of Columbia for said years.

For the year ending June 30th, 1876, as follows:

Sq. 784, lot of five; value of lot, $450; value of improvements, $2,000.00; total value, $2,450.00.

For the year ending June 30th, 1877, as follows:

Sq. 784, lot of 5; value of lot, $450.00; value of improvements, $2,000.00.
Sq. 1028, lot 8; value of lot, $530.00.
" " lot 9; value of lot, $907.00.
" " lot 10; value of lot, $1,209.00.

For the year ending June 30th, 1878, as follows:

Sq. 784, lot of 5; value of lot, $450; value of improvements, $1,200.00.
Sq. 1028, lot 8; value of lot, $530.00.
" lot 9; value of lot, $907.00.
" lot 10; value of lot, $1,209.00.

MATTHEW TRIMBLE,
Assessor D. C.

[SEAL.]

96 Mr. GORDON: I also offer in evidence the original deed from Philip Levis and wife to Joseph Weaver, trustee, recorded in Liber 815 and folio 463 of the land records of the District of Columbia.

The examiner marked the deed C. R. K., Exhibit No. 3.

EXHIBIT C. R. K. No. 3.

This indenture, made this thirteenth day of May in the year of our Lord one thousand eight hundred and seventy-six between Philip Levis and Mary Clara his wife, of Washington county D. C. — the first part, and Joseph Weaver of Georgetown said District of the second part.

Whereas, the said Philip Levis is justly indebted unto George Kengla & Bro. in the sum of three hundred dollars for which amount he has given his promissory note of even date herewith payable to the order of said George Kengla & Bro. one year after date with interest at ten per cent. per annum until paid, payable annually.

And whereas the said parties of the first part are desirous to secure the full and punctual payment of said note, and all interest, costs, and expenses that may accrue thereon, according to the true intent and meaning of the aforesaid promissory note:

Now, therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar, in lawful money of the United States to them in hand paid by the said parties of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents, grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part, and the survivor of them, his heirs and assigns, all that tract of land situated in the county of Washington and the District of Columbia, being all that portion of a part of Alliance Cut conveyed by Walter Smith to Agnes Levis by deed dated 21 March 1842 and recorded in Liber W. B. No. 96 folio 410 which remained to the lands of Agnes Levis after the conveyances of parts thereof made by her to Andrew Heiss on the 15th of Feb. 1866 in Liber N. C. T. 30 folio 150 to Edward Brooke Feb. 15, 1866 in Liber R. M. H. 25 folio 345 and to Phil. L. Brooke on the 15th Jan. 1866 in Liber 564 folio 356 and containing about 60 acres.

Together, with all the improvements, ways, easements, rights, privileges, and appurtenances, to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise, however, of the said parties of the first part, of, in, to, or out of the said described real estate and premises.

97 To have and to hold the said described real estate, and premises, and appurtenances, unto and to the use of the said parties of the second part, and to the survivor of them, his heirs and assigns.

In and upon the trusts nevertheless, hereinafter mentioned and declared, that is, in trust to permit the said parties of the first part their heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof, to take, have and apply, to and for their sole use and benefit, until default be made in the payment of said principal note, or any installment of interest thereon, or any proper cost, charge, commission, or half commission, or expense in and about the same.

And upon the full and punctual payment of all of said principal note and the interest thereon, and all other proper costs, charges, commissions, half commissions, and expenses, at any time before the sale hereinafter provided for, to release and to reconvey the said described premises unto the said parties of the first part their heirs or assigns, at their cost.

And upon this further trust, that upon default being made in the payment of the said principal note or any installment of interest thereon, or any proper cost, charge, commission or half commission, or expense in and about the same, then, and at any time hereafter, to sell the said described real estate and premises, at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement as the said parties of the second part, their heirs or the trustee, acting in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee-simple to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase-money; and of the proceeds of said sale or sales, first to pay all proper costs, charges and expenses, and to retain as compensation a commission of 5 per cent., on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said principal note and the interest thereon, whether the same shall be due or not, and lastly, to pay the remainder, if any, to said parties of the first part their executors, administrators, or assigns.

And the said parties of the first part do hereby agree at their own cost, during all the time, wherein any part of the matter hereby secured shall be unpaid or unsettled, to keep the said improvements insured against fire, in the name and to the satisfaction of said parties of the second part, who shall pay whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; and that upon any default or neglect to insure, any party secured hereby may have said improvements insured and at the expense thereof shall be a charge hereby secured, and bear like interest as the matter hereby secured.

In testimony whereof, the said parties of the first part, have hereunto set their hand- and seal- on the day and year first hereinbefore written.

PHILIP LEVIS. [SEAL.]
MARY CLARA LEVIS. [SEAL.]

98 The interlineation on line 32 was made before the signing of deed. WM. MARTIN, *J. P.*

Signed, sealed, and delivered in the presence of—
WM. MARTIN.

13—173

DISTRICT OF COLUMBIA, *County of Washington,* } *scilicet:*

I, William Martin, a justice of the peace in and for the said county, in said District, do hereby certify that Philip Levis and Mary Clara Levis, his wife, parties to a certain deed bearing date on the thirteenth day of May, A. D. 1876, and hereto annexed, personally appeared before me in said county, the said Philip Levis and Mary Clara Levis, his wife, being personally well known to me to be the person who executed the said deed, and acknowledged the same to be their act and deed; and the said Mary Clara Levis, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and my seal this thirtieth day of May, A. D. 1876.

WM. MARTIN, *J. P.* [SEAL.]

Endorsement: Deed of trust. Philip Levis *et ux.* to Joseph Weaver. 1.30 p. m. Received for record on the 13 day of May, A. D. 1876, at — o'clock — m., and recorded in Liber No. 815, folio 463, one of the land records for the District of Columbia, and examined by S. Wolf, recorder.

Mr. GORDON: I also offer in evidence the deed from Joseph Weaver, trustee, to George M. Kengla and Charles Robert Kengla, dated January 17th, 1878, recorded in Liber 874 and folio 414 of the land records of the District of Columbia.

The examiner marked the deed so offered C. R. K., Exhibit No. 4.

EXHIBIT C. R. K. No. 4.

This indenture, made this seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, by and between Joseph Weaver, of the District of Columbia, of the first part and George M. Kengla and Charles R. Kengla of the same place of the second part; whereas heretofore, to wit, on the 13th day of May A. D. 1876, Philip Levis and wife by their deed duly executed and recorded in Liber No. 815 folio 463 one of the land records of the District of Columbia, did convey to the said party hereto of the first part his heirs and assigns the property hereinafter described in and upon certain trusts, and among others, in trust that in case default
99 be made in the payment of the promissory note referred to and described in said trust, then to sell the said property at public auction upon such terms and conditions, and at such time and place and after such previous public advertisement as he should deem advantageous and proper and to convey the same in fee-simple to and at the cost of the purchaser or purchasers thereof &c. &c., all of

which will fully appear by reference to said deed; and whereas default having been made in the payment of said promissory note and the said Joseph Weaver having been requested by the holder of said note to proceed and sell said property he did on the 29th day of October A. D. 1877, at the hour of one o'clock p. m., on the premises, having first given due notice of the time, place and terms of sale in the "Evening Star" a newspaper published and printed in the District of Columbia, offer for sale the said property, at public auction, at which time and place, he then and there sold said property to the said parties hereto of the second part, at and for the sum of one thousand dollars, subject to a prior trust to secure $2,000, they being then and there the highest bidders therefore; and whereas said parties of the second part having complied with the terms of sale are now entitled to a deed therefor;

Now, therefore, this indenture, witnesseth, that the said party of the first part for and in consideration of the premises and further the sum of one thousand dollars current money of the United States, to him in hand paid by the said parties of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and doth by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said parties of the second part, their heirs and assigns forever, as tenants in common and not as joint tenants, all that tract of land situated in the county of Washington and District of Columbia, being all that portion of a part of "Alliance," conveyed by Walter Smith to Agnes Levis by deed dated 21st March A. D. 1872 and recorded in Liber W. B. No. 96 folio 410, which remained to the lands of Agnes Levis after the conveyances of parts thereof made by her to Andrew Heiss on the 15th of February 1866 in Liber N. C. T. 30 folio 150, to Edward Brooke February 15th 1866 in Liber R. M. H. 25 folio 345 and to Philip L. Brooke on the 15th January A. D. 1866 in Liber 564 folio 356 and containing about sixty acres of land, together with all the improvements, ways, easements, rights, priviliges and appurtenances, to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise, however of the said Joseph Weaver and of the said Philip Levis and wife, of, in, to or out of the said described real estate and premises.

To have and to hold the said described real estate and premises and appurtenances, unto and to the use of the said parties of the second part, their heirs and assigns, for their sole use, benefit and behoof forever, as tenants in common and not as joint tenants.

100 In witness whereof the said Joseph Weaver has hereunto set his hand and seal the day, and year first hereinbefore written.

JOSEPH WEAVER, *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—

L. S. FREY.

DISTRICT OF COLUMBIA, } *sct:*
Washington County, }

I, L. S. Frey, a notary public in and for the county and District aforesaid, do hereby certify that Joseph Weaver, party to a certain deed bearing date on the seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and hereunto annexed, personally appeared before me, in the county aforesaid, the said Joseph Weaver being personally well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this seventeenth day of January, A. D. 1878.

[SEAL.]

L. S. FREY,
Notary Public for the District of Columbia.

Endorsement: Deed. Joseph Weaver to George M. & Charles R. Kengla. Deed. 12.30 p. m. Received for record January 26, 1878, and recorded in Liber No. 874, folio 414, one of the land records for the District of Columbia, and examined by Geo. F. Schayer, dep. recorder.

The defendant thereupon announced his testimony closed.

DISTRICT OF COLUMBIA, *ss:*

I, Charles W. Stetson, examiner in chancery in and for the city of Washington, District of Columbia, do hereby certify that the foregoing depositions on behalf of defendant were taken down by me in shorthand, at the time and place mentioned in the caption thereto, from the oral statements of the witnesses, and that after the same had been reduced by me to typewriting were read over to or by said witnesses and subscribed to by them in my presence, said witnesses having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause. The deposition of the witness Thomas Dowling was signed by me with consent of counsel.

I further certify that I am not of counsel in said cause or otherwise interested in the result of said suit.

CHARLES W. STETSON,
Examiner in Chancery.

Fee, $15, paid by complainant's counsel by order of court.

101 *Testimony on Behalf of the Complainant.*

WASHINGTON, D. C.,
TUESDAY, *July 9th*, 1895—two o'clock p. m.

The parties met, pursuant to adjournment, to take testimony under amended bill at the office of Mr. J. Holdsworth Gordon, # 330 Four-and-a-half street N. W., city.

Present on behalf of the complainant, Mr. Moulton.
Present on behalf of the defendant, Mr. Gordon.
Present, Mr. Levis and the examiner.

Mr. GORDON: I would like to offer in evidence an entry in Boyd's Washington Directory for the District of Columbia for the year 1879, on page 747. The entry is as follows: "Triplett, William H., physician, # 1019 F street northwest; office hours: nine to ten a. m., one p. m., and five to seven p. m."

Mr. MOULTON: Please note an objection to the competency of this.

PHILIP LEVIS, the complainant, was thereupon recalled.

By Mr. MOULTON:

Q. Mr. Levis, please look at the paper I now hand you, which is the Defendants' Exhibit J. J. J. No. 1, and state to the examiner whether you ever saw it before.

A. No, sir.

Q. One entry on this account is as follows: "By balance paid Levis, $413.73. This balance paid on interest of first note per order of Levis." Please state whether or not any person ever mentioned that sum to you or whether or not you ever had any conversation with any one in relation to such a sum.

A. I never had any conversation with any one in relation to such a sum, and have no knowledge whatever about it.

Q. Did you know William D. Cassin, a member of the bar, in his lifetime?

A. Well, I have known of him.

Q. Did you ever in your life exchange a word with him in reference to this transaction?

A. I did not.

Q. Did he ever mention the transaction to you in any way or form?

A. He did not.

Q. Look at the paper I now hand you, being the Defendants' Exhibit C. R. K. No. 1 (testimony to the amended bill), and state whether or not any person ever advised you of the cancellation of that note—that is, the $2,000.

A. Never did.

Q. Have you ever seen that note before now since you gave it to Mr. Dodge and obtained the loan?

102 A. I have never saw it. This is the first time I have laid eyes on it since.

Q. Now, will you look at Exhibit C. R. K. No. 2 (testimony to amended bill), which is the $300 note involved in this suit, and state whether or not you have ever seen that since the time you first delivered it and obtained the loan of money on it?

A. No, sir; I never saw it, sir

Q. So far as you have any knowledge, who has held both these notes down to the present time?

A. I have not any knowledge of Mr. Kengla's having held them.
Q. Now, just wait a moment. Hear my question and then answer it.
A. I have not any knowledge.
Q. You don't mean that?
A. Mr. Kengla has held them.

The examiner thereupon read over, at request of counsel for complainant, to the witness the three questions and answers next proceeding.

Q. Do you mean by your last three answers that Messrs. Kengla have held the notes from the time the loans were made down to the present time, so far as you have any knowledge?

Mr. GORDON: Objected to as leading and suggestive.

A. They have.

Cross-examination.

By Mr. GORDON:

Q. Mr. Levis, did you never have any conversation with William D. Cassin about this transaction at all?
A. I did not.
Q. You say you knew him only by reputation and not personally?
A. Well, I knew him only when I saw him.
Q. Did you see him at that sale?
A. I did not.
Q. You do not know his handwriting, of course?
A. No, sir.
Q. Did you ever have any conversation with anybody in reference to the settlement of this sale?
A. I did not.
Q. Did you ever know it was settled?
A. I did not.
Q. Never took any part in a settlement at all?
A. No, sir.
Q. You signed this note that has been shown you by Mr. Moulton, marked Exhibit C. R. K. No. 1 (testimony under amended bill), being the $2,000 note?
A. Yes, sir.
Q. Did you ever pay any interest on that note at all?
A. I did not.
103 Q. So that from its date up to the present time you have never paid any interest on it?
A. No, sir.
Q. The second note that he showed you—C. R. K., Exhibit No. 2 (testimony to amended bill)—you signed that too?
A. Yes, sir.

Q. And you have never paid any interest on that note from its date to the present time?

A. No, sir.

Mr. GORDON: That is all.

PHILIP LEVIS.

Sworn and subscribed to before me this eighth day of October, 1895.

CHARLES W. STETSON, *Examiner.*

Counsel for the complainant thereupon announced his testimony closed.

DISTRICT OF COLUMBIA, *ss:*

I, Charles W. Stetson, an examiner in chancery in and for the District of Columbia, do hereby certify that the depositions hereto attached were taken down by me in shorthand, in the presence of and from the oral statements of the witnesses, at the times and places therein designated, and after the same had been reduced to writing were read over to the witnesses and by them subscribed to in my presence (with the exception of such of the depositions as were signed by me with consent of counsel on both sides), said witnesses having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

CHARLES W. STETSON,
Examiner in Chancery.

In the Supreme Court of the District of Columbia.

PHILLIP LEVIS
vs.
CHARLES R. KENGLA, EDITH LOUISE KENGLA, and EUNICE MARIE KENGLA. } No. 14634. In Equity

The president of the United States to Charles R. Kengla, in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal allowed in the supreme court of the District of Columbia on the 27th day of November, 1895, wherein
104 Phillip Levis is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 2d day of December, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 2nd day of December, 1895.

GORDON & GORDON,
Attorney- for Appellee.

(Endorsed:) No. 14634. Equity. Philip Levis *vs.* Charles R. Kengla *et al.* Citation. Issued Dec. 2, 1895. Served cop- of the within citation on —— ——. —— ——, marshal. H. B. Moulton, attorney for appellant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 169, inclusive, to be true copies of originals in cause No. 14634, at law, wherein Phillip Levis is complainant and Charles R. Kengla *et al.* are defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of January, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 533. Phillip Levis, appellant, *vs.* Charles R. Kengla, in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla. Court of Appeals, District of Columbia. Filed Jan. 17, 1896. Robert Willett, clerk.

105 In the Court of Appeals of the District of Columbia.

PHILLIP LEVIS, Appellant,
vs.
GEORGE M. KENGLA and CHARLES *B.* KENGLA. } No. 533.

Original Bill.

Filed March 29, 1893.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
vs.
GEORGE M. KENGLA and CHARLES *B.* KENGLA. } In Equity. No. 14634, Docket 33.

To the supreme court of the District of Columbia, holding an equity court for said District:

The plaintiff states as follows:

1.

Plaintiff and defendants are citizens of the United States and residents of the District of Columbia and sue and are sued in their own right.

2.

That on the 13th day of May, 1876, the plaintiff was the owner of the following-described real estate, situate, lying, and being in the said District, to wit: All that portion of or part of a tract of land called "Alliance," which was conveyed by Walter Smith to Agnes Levis by deed dated March 21, 1842, and recorded in Liber W. B. No. 96, folio 410, of the land records of the District of Columbia, which remained of the lands of the said Agnes Levis after conveyances of parts thereof made by her to Andrew Heiss on the 15th day of February, 1856, the deed of which is recorded among said land records in Liber N. C. T. 30, at folio 150, and by her to Edward Brooke by deed dated February 15, 1866, and recorded among said land records in Liber R. M. H. 25, at folio 345, and to Philip Brooke by deed dated the 15th day of January, 1866, and recorded among said land records in Liber 564, folio 366. For a more particular description of the lands so conveyed reference to said deeds of record is hereby made and the same are prayed to be taken as
106 part hereof, the land thus remaining after said conveyances being about sixty acres, more or less.

3.

And, being the owner thereof, plaintiff on said 13th day of May executed a deed of trust to one Joseph Weaver, whereby he conveyed said described real estate to said Weaver in fee, but in trust, however, to secure to the defendants a promissory note of plaintiff's

for three hundred dollars, said note bearing even date with said deed and made payable to the order of defendants in one year after the date thereof, with interest at the rate of ten per centum per annum, payable annually. Said deed of trust is recorded among the land records of said District, in Liber 815, at folio 463 *et sequitur*, and leave is prayed to file a certified copy thereof whenever the same shall be necessary.

4.

At the time of said conveyance in trust said real estate was encumbered by a prior deed of trust also executed by plaintiff to R. P. Dodge and Philip Darneille and dated October 29th, 1875, to secure the promissory note of plaintiff, bearing even date with said deed, for the sum of $2,000.00 and payable in three years from the date thereof to one S. D. Clokey, with interest at ten per centum per annum, payable semi-annually. Said deed of trust is recorded among said land records in Liber 795, at folio 408 *et sequitur*, and leave is prayed to file a certified copy thereof whenever the same may be necessary.

5.

On the 29th day of October, A. D. 1877, said promissory note for $300 being overdue and unpaid, said Weaver, by direction of the defendants, who were the then holders of the note, undertook to make public sale, by auction at the premises, of said real estate, at the hour of 1 p. m. of said day; but there being present no bidders or any persons interested in the purchase of said property except the defendants, the threatened sale was objected to by plaintiff and was only permitted to be made without protest upon the verbal statement by defendants that they only desired to obtain out of the property the amount of the incumbrances thereon, and that if the said sale was permitted to be made they, said defendants, would reconvey the same to plaintiff, or so much thereof as was left after sufficient had been sold by them to satisfy the total indebtedness in full then against said property, together with the costs of sale; whereupon, relying upon said promise, plaintiff suffered an informal sale of said property to be made to the defendants by said trustee at and for the sum of $1,000.00, subject to the said deed of trust for two thousand dollars. No deed, however, was made by said trustee to said defendants of said property until the 17th day of January, 1878, when the same was executed by him to said defendants and is now of record among said land records, in Liber 874, at folio 817 *et seq.*, and leave is prayed to file a certified copy
107 thereof whenever the same may be necessary. Plaintiff has no knowledge whether the said $1,000 or any part thereof was ever paid by said defendants or any one for them to said trustee. Plaintiff avers and charges, however, that no account or payment of any sort has ever been made to him of the surplus proceeds of said sale.

6.

The real estate permitted by plaintiff to be thus informally sold was well worth at that time at least ten or twelve thousand dollars, and but for said verbal agreement plaintiff would never have acquiesced in a *bona fide* sale thereof for the sum of $1,000.

7.

On the 26th day of May, 1879, said defendants executed a deed in fee of that date of about twenty-seven acres of said property to one Thomas L. Hume at and for a cash payment of $356.89 and a deferred payment of $2,400.00, represented by the three promissory notes of said Hume, bearing even date with said deed, for $800.00 each and payable in one, two, and three years after the date thereof, with interest at the rate of six per centum per annum, payable semi-annually, and secured by deed of trust upon the property so conveyed. Reference is made for a more particular description of the property so conveyed to said deed in fee and said deed of trust as the same are recorded respectively among said land records in Liber 911, at folios 405 *et sequitur* and 392 *et sequitur*, and leave is prayed to file certified copies thereof whenever the same may be necessary.

8.

Plaintiff is advised that said deferred payments were only made at a comparatively recent period, the exact date of which is unknown to him. He prays leave, however, to incorporate said date in this bill as soon as he shall have ascertained the same.

9.

Plaintiff continued in possession of the remaining portion of said property for nearly a year after said informal foreclosure sale, when he moved therefrom on the receipt of a notice to quit from said defendants.

10.

Ever since said last-mentioned sale to said Hume the defendants have continued in possession of said property, and have made no attempt, so far as plaintiff is advised, to sell or dispose of any more of said real estate until within a few days last past, when, as plaintiff is informed and believes, they commenced negotiating with some person or persons unknown to plaintiff to sell the whole of said property at and for a sum largely in excess of that sufficient to pay off the whole of whatever remains unpaid of said indebtedness of $2,300, with interest and costs; and plaintiff avers and charges
108 that a sale of not more than two acres of said land would largely more than suffice to pay the whole of said indebtedness, with interest and costs, and that it would, therefore, be inequitable to permit a sale to be made by said defendants at their discretion of the whole of said property, and that to do so would result in great loss and damage to plaintiff, for which he has no adequate remedy except in this court.

Wherefore plaintiff prays:

Prayers.

1. That the defendants may be required to appear and answer the exigency of this bill of complaint.
2. That the defendants be restrained and enjoined from making any sale of said property.
3. That an account may be taken of how much of said indebtedness of $2,300.00, with interest and costs of sale and any other outlays of defendants on account thereof, have been satisfied by defendants out of the real estate hereinbefore described, and on the coming in of said account plaintiff may be permitted to pay said amount, and on the payment thereof that the defendants be required to reconvey said land to plaintiff.
4. That plaintiff may have such further and other relief as the nature of the case may require and to the court may seem just and proper.

PHILIP LEVIS.

The defendants to this bill of complaint are George M. Kengla and Charles *B.* Kengla.

FRANKLIN H. MACKEY,
JOHN S. BLANKMAN,
Solicitors for Plaintiff.

I, Philip Levis, being duly sworn, depose and say that I have heard read the above bill of complaint by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge I know to be true, and those stated on information and belief I believe to be true.

PHILIP LEVIS.

Subscribed and sworn to before me this 29th day of March, 1893.

JOHN R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

109 *Answer of Defendants, George M. Kengla and Charles* B. *Kengla.*

Filed April 25, 1893.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
v.
GEORGE M. KENGLA and CHARLES *B.* KENGLA. } Equity. 14634.

The answer of the defendants, George M. Kengla and Charles *B.* Kengla, to the bill of complaint.

These defendants, for answer, say:

1.

They admit the truth of the allegations in the first paragraph of the bill contained.

2.

They admit the truth of the allegations in the second paragraph of the bill contained.

3.

They admit the truth of the allegations in the third paragraph of the bill contained.

4.

They admit the truth of the allegations in the fourth paragraph of the bill contained.

5.

In answer to the allegations in the fifth paragraph of the bill contained, they say: It is true that on the 29th day of October, 1877, the promissory note for three hundred dollars, with interest thereon from the date thereof, was due and unpaid, and that at their request Joseph Weaver, who is now dead, as trustee under the deed of trust securing said note, had duly advertised said property for sale, by Thomas Dowling, auctioneer, on said named day in the Evening Star, a newspaper printed in the city of Washington, in the District of Columbia, as will appear from a copy of said advertisement, filed herewith, marked "Exhibit A." They also say that at said time they were holders, for valuable consideration, of the note of two thousand dollars, mentioned in the fourth paragraph of the bill, upon which interest from date of said note was unpaid: that on said 29th day of October, 1877, said property was sold to them at public vendue, on the premises, by said trustee, in the presence of a proper company, at and for the sum of one thousand dollars and subject to the sum of two thousand dollars
110 secured by the prior trust thereon, they being then and there the highest bidders therefor; that said sale was made by the said trustee in good faith and after all of the requirement of the deed of trust in Liber 815, folio 463, had been fully complied with. They further say that the purchase-money for said sale was fully paid and that they had fully settled with the trustee with regard thereto before his deed to them for said property was delivered. They further say that said trustee conveyed said property to them by deed, duly executed, dated on the seventeenth day of January, A. D. 1878, and recorded in Liber 874, folio 414, of said land records, since which time they have heard no complaints from the plaintiff in reference thereto, nor had any claim then — made by him in regard to the same until the filing of the bill. They further say that the note of two thousand dollars secured by the deed of trust recorded in Liber 795, folio 413, having been marked "canceiled" by the trustees on the 18th day of January, 1878, said trust was released to them by deed recorded in Liber 874, folio 413, of said land records. They further say that they know nothing as to the allegations of the plaintiff that the said Joseph Weaver, as trustee, failed to furnish him with an account of said sale, but they believe said trustee, if he did not actually furnish said account,

would have done so had he been so requested by the plaintiff. They further say that an account of said sale was made out, and that they have in their possession a statement, in the handwriting of William D. Cassin, deceased, late a member of the bar of this court, who closed the sale for the parties showing the distribution of the proceeds of sale. And further answering, they deny that at any time before said sale it was objected to by the plaintiff, and was only permitted to be made without protest upon the verbal statement by them that they only desired to obtain out of the property the amount of the encumbrances thereon, and that if the said sale was permitted to be made they would reconvey the same to the plaintiff, or so much thereof as was left after sufficient had been sold by them to satisfy the total indebtedness in full then against said property, together with the costs of sale, as alleged by the plaintiff. Further answering, they deny that at any time before the sale there was any understanding, agreement, or suggestion of any kind whatsoever between them and the plaintiff to impeach or qualify the absolute purchase of the property by them for their own use and benefit. And further answering, they say that after said sale was made to them the plaintiff informed them that he believed he could obtain a purchaser for said property at a greater price than the same had been sold to them; that, wishing the plaintiff to obtain as much as possible out of said property, they informed him that if he could obtain such purchaser within two weeks from the day of sale, they would convey to such purchaser and turn over to him, the plaintiff, the increased price obtained; that the plaintiffs endeavored to obtain such purchaser, but finally came to them and informed them that he had failed to find a purchaser; whereupon they obtained a deed from the trustee, and thereafter heard nothing further from the plaintiff in regard to the said sale to them.

111 6.

They deny that the value of the property at the time of said sale was largely in excess of the price for which they purchased the same, but, on the contrary, they say that said price was fully as much as the same could have been sold for at that time; and they further say that said sale was *bona fide* in all respects and made in conformity to the powers contained in the deed of trust in Liber 815, fol. 463, under which it was made.

7.

They admit that on the 26th day of May, 1879, they sold and conveyed to Thomas L. Hume a certain portion of said property, containing twenty-seven (27) acres two (2) roods and eleven (11) perches of land, by deed recorded in Liber 911, folio 455, of said land records, at and for the sum of twenty-seven hundred and fifty-six $\frac{89}{100}$ dollars, of which three hundred and fifty-six $\frac{89}{100}$ dollars was cash and the balance in deferred notes secured by deed of trust to ——, dated the same day and recorded in Liber 911, folio 392, of said land records. They further say that the circumstances attending said sale were as follows:

Said Hume being desirous that a certain road, now known as the Tunlaw road, should be opened to certain property belonging to him, offered to purchase so much of said tract above mentioned as should lie west of said road at and for the price above named, provided these defendants would convey to the District of Columbia, without consideration, so much of said tract as was embraced in the bed of said road. After due consideration, these defendants agreed to said proposition and made the said conveyance to said Hume, and at the same time donated to the District of Columbia said road-bed, containing two (2) acres one (1) rood and twenty-nine (29) perches of land, and conveyed the same to said District by deed recorded in Liber 919, folio 257, of said land record; which said deed they pray may be read at the hearing of this cause. They further say that the plaintiff had *from* knowledge of the said sale to said Hume and the consideration therefor and the entire transaction, and, although he had such full knowledge of said sales and conveyances and the consideration paid for the same, he neither made objection thereto nor made any inquiry of them in regard to the same nor asked for any accounting, although he was in frequent communication with them.

8.

In answer to the allegations in the eight- paragraph of the bill contained, they say that the final settlement of the deferred payments for said property sold to said Hume was by public sale made by trustees under the trust deed securing the deferred notes, on the 13th day of April, 1885, when said property was sold for fourteen hundred dollars.

112 9.

In answer to the allegations in the ninth paragraph of the bill contained, they say that it is true that the plaintiff remained on the property for some time after the sale thereof to them—possibly for one year thereafter, although they cannot now remember the exact time. They, however, say that at the urgent request, subsequently to the sale to them of the plaintiff, who had been their lifetime acquaintance and neighbor, and who represented himself as with but little means, they permitted him to remain on said property, not as a matter of right, but purely from friendly and charitable considerations; that subsequently, desiring to occupy said property themselves, they gave the plaintiff formal notice to quit the same, and, recognizing their right to possession, he thereupon removed therefrom; that said plaintiff made no protest against leaving nor any claims to the property. Since the plaintiff removed from the property they have been in full and uninterrupted possession and enjoyment of the same, and are now in full and uninterrupted possession and enjoyment of so much thereof as was not conveyed by them to said Thomas L. Hume and to the District of Columbia.

10.

In answer to the allegations in the tenth paragraph of the bill contained, they say: It is true that they have been in possession of said property in law since the conveyance to them by Joseph Weaver, trustee, and in possession thereof in fact since the plaintiff vacated the same upon receiving notice from them to quit, and that said possession has been without let or hindrance or protest on the part of the plaintiff; that since their occupation and possession of said property they have paid the taxes thereon and in many ways greatly improved the condition thereof; they admit it is also true that they have contracted to sell said property, and that by reason of this suit said sale is in obeyance. They are advised, and, being so advised, charge, that the plaintiff has no claim whatever to said property or to any accounting from these defendants in regard to the same; that the verbal agreement to allow the plaintiff two weeks subsequent to the day of the sale to them within which to obtain a purchaser for said property has long since expired, and, even had the same not long since expired by its own limitations, it is not such an agreement as would bind real estate under the provisions of the statute of frauds. Further answering, they say that the claim set up by the plaintiff and which they believe is now for the first time asserted on account of the increased value of the property, even had the same been true, which they deny, is stale and the lapse of time in asserting the same wholly unexplained, and that with full knowledge of all the circumstances attending said sale the plaintiff has acquiesced in the same: and that even had there been originally any equity in the claim set up, which is denied, a court of equity will not entertain said claim after an acquiescence for nearly six-
113 teen years and after the death of Joseph Weaver, the trustee who made said sale; William D. Cassin, the attorney who attended to the same, and Thomas L. Hume, who bought a portion of the property, all of whom were concerned in and familiar with the transaction. These defendants believe and charge that the plaintiff has filed the bill in this cause on account of the increased value of the property and for the sole purpose of delaying and hindering them in carrying out their contract for the sale of said property. They also charge that the plaintiff in his bill has failed to show anything entitling him to relief in the premises, and, having fully answered, they pray to be hence dismissed with their reasonable costs.

GEORGE M. KENGLA.
CHARLES R. KENGLA.

GORDON & GORDON, *Solicitors.*

We solemnly swear that we have read the answer by us subscribed and know the contents thereof; that the facts therein stated of our personal knowledge are true, and those stated on information and belief we believe to be true.

GEORGE M. KENGLA.
CHARLES R. KENGLA.

Sworn to and subscribed before me this 24th day of April, A. D. 1893.

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

EXHIBIT "A."

Filed April 25, 1893.

Thomas Dowling, auctioneer.

Trustee's sale of a valuable farm at auction, containing sixty acres of land and improvements, lying between the farm of Thomas L. Hume and Tennallytown road.

By virtue of a deed of trust, dated 13th May, 1876, recorded in Liber 815, folio 463, of the land records of Washington county, D. C., and by direction of the holders of the note secured thereby, I will sell at public auction, on the premises, on Monday, the 29th day of October, 1877, at one o'cl'k p. m., all that tract of land situated in the county of Washington and the District of Columbia, being all that portion of a part of "Alliance" conveyed by Walter Smith to Agnes Levis by deed dated March 21, 1842, and recorded in Liber W. B. No. 96, folio 410, which remained to the lands of Agnes Levis after the conveyances of parts thereof made by her to Andrew Heiss on the 15th day of February, 1866, in Liber N. C. T. 30, folio 150; to Edward Brook, in Liber R. M. H. 25, folio 345, and to Philip L. Brook on the 15th January, 1866, in Liber 561, folio 356, and containing about 60 acres, improved with dwelling and outhouse.

114 Terms of sale: One-fourth cash; balance in one and 2 years, secured by notes bearing 8 per cent. interest and deed of trust on the property; $100 down when the property is struck off; conveyancing at purchaser's cost. The above sale is subject to a prior trust of $2,000.

(Signed) JOSEPH WEAVER, *Trustee.*

Replication.

Filed October 17, 1893.

In the Supreme Court of the District of Columbia.

PHILIP LEVIS
v.
GEORGE M. KENGLA and CHARLES B. KENGLA. } In Equity. No. 14634.

The plaintiff hereby joins issue with the defendants.

P. B. STILSON,
Solicitor for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing papers to be true copies of original bill, answer of the defendants, and replication in cause No. 14634, in equity, wherein Philip Levis is complainant and George M. Kengla and Charles B. Kengla are defendants.

Witness my hand and the seal of said court this 18th day of February, A. D. 1896.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Court of Appeals of the District of Columbia.

PHILIP LEVIS
vs.
CHARLES R. KENGLA *et als.* } No. 533.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the original bill filed herein, the answer to said original bill filed by the defendant-, George M. Kengla and Charles Robert Kengla, and the replication thereto, omitted by accident from the transcript forwarded to the Court of Appeals, shall be sent by the clerk of the supreme court of
115 the District of Columbia to said Court of Appeals and become and be printed as a part of the record in said court.

H. B. MOULTON,
Sol. for Compla'nt.
GORDON & GORDON,
Solicitors for Defendants.

(Endorsed:) Court of Appeals, D. C., January term, 1896. No. 533. Philip Levis, appellant, *vs.* Charles R. Kengla *et als.* Stipulation of counsel as to addition to record. Court of Appeals, District of Columbia. Filed Feb. 18, 1896. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 533. Philip Levis, appellant, *vs.* George M. Kengla and Charles B. Kengla. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Feb. 18, 1896. Robert Willett, clerk.

116 TUESDAY, *March 3d, A. D.* 1896.

PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla. } No. 533.

The argument in the above-entitled cause was commenced by Mr. H. B. Moulton, attorney for the appellant, and was continued by Mr. J. H. Gordon, attorney for the appellees.

WEDNESDAY, *March 4th, A. D.* 1896.

PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla. } No. 533.

The argument in the above-entitled cause was continued by Mr. J. H. Gordon, attorney for the appellees, and was concluded by Mr. H. E. Davis, attorney for the appellant.

117 PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right, and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla. } No. 533.

Opinion of Court.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from a decree of the supreme court of the District of Columbia, dismissing a bill of complaint in equity filed for the purpose of enforcing an alleged trust in regard to real estate.

Philip Levis, the appellant, was the owner of a tract of land, containing about sixty acres, in the northwestern section of the county of Washington. Being such owner, he mortgaged the property for the sum of $2,000 by a conveyance thereof on October 29, 1875, to R. P. Dodge and Philip Darneille by a deed of trust to secure his note for that amount payable in three years thereafter to one S. D. Clokey, with interest at the rate of ten per centum per annum payable semi-annually. Subsequently said mortgage and promissory note being outstanding, he mortgaged the property a second time, on May 13, 1876, by a conveyance thereof by deed of trust to Joseph Weaver as trustee to secure his promissory note for $300 payable to Charles R. Kengla and George M. Kengla in one year thereafter, with interest at the rate of ten per centum per annum, payable annually.

Neither the principal sum nor any installment of interest on either note was ever paid by the maker; and on October 29, 1877, several months after the maturity of the note for $300 and default made in its payment, the trustee Weaver, after previous advertisement, offered the property for sale at auction under the second deed of trust, and sold the same to Charles R. Kengla and George M. Kengla, the persons secured by the deed, for the sum of $1,000, subject to the prior deed to secure the note for $2,000. This note for $2,000 seems to have come before that time into the hands of the Kenglas, and to have then been held by them. Some installments of interest had matured upon it, and remained unpaid; but the note itself had not become due.

In consequence of some arrangement, by which Levis was to have some time within which to redeem the property from the sale, if he

could, the execution of a deed of conveyance from the trustee Weaver to the Kenglas, as purchasers of the property, was postponed for upwards of two months; but this deed was finally executed on January 17, 1878. On the next day (January 18, 1878), Dodge and Darneille, the trustees under the first deed of trust, executed a deed of conveyance to the Kenglas, releasing the property from the operation of that trust, and reciting therein that the note for $2,000 had been produced in their presence and cancelled by direction of the Kenglas, its owners, and now also the owners of the property, and that the purposes for which the trust had been created had therefore ceased and been determined.

Both at the time of sale and for some time afterwards the appellant and the Kenglas seem to have been on friendly terms; and the appellant was permitted to remain in possession of the property for about a year after the sale, there being some kind of a house upon it in which he resided and which seems to have been destroyed after he left it. About a year, however, after the sale, the Kenglas notified the appellant, to surrender the property to them; and he did so, and moved away, the notice to quit coinciding, as he claims, with a desirability to be nearer to his business, which was that of a butcher in the markets of Washington.

The next step taken by the appellant was the filing of the original bill in this case on March 29, 1893, more than fifteen years after the sale, and more than fourteen years after his abandonment of the property to the Kenglas on their demand, when in the meantime, in consequence of unexpected speculations in the neighborhood, it had risen enormously in value. In this bill he set up the claim, that, at the sale on October 29, 1877, there were no bidders present, or any persons interested in the purchase of the property, except the Kenglas, and that thereupon he objected to the proposed sale, which, however, he finally permitted to be made without protest from him, upon the verbal statement of the Kenglas that they only desired to obtain out of the property the amount of the incumbrances thereon, and that if said sale was permitted to be made, they (the Kenglas) would reconvey the property, or as much thereof as was left after sufficient should be sold to satisfy the indebtedness and the costs of sale. He says that, relying upon this promise, he suffered what he calls "an informal sale" of the property to be made to the Kenglas, they being the only bidders, for the sum of $1,000, as already stated, subject to the first deed of trust.

In an amended bill filed on May 16, 1895, the statement of
118 the transaction was slightly modified. In this amended bill the appellant says that "there being no bidders present or any person interested in the purchase of said property, the threatened sale was objected to by the complainant and was not proceeded with until said defendants had stated to the complainant, in the presence of witnesses, that they only desired to obtain out of the property the amount of the incumbrance thereon, and that if he would permit them to go through the form of a sale the said defendants would take and hold the same for the benefit of the complainant and would reconvey the same to the complainant, or so

much thereof as was left after sufficient had been sold to satisfy the defendant's claim, together with the costs of the sale; whereupon, and relying upon the promise of the said defendants that they would take and hold said property in trust for the use and benefit of the complainant, he permitted an informal sale of said property to be made to the said defendants by the said trustee, Weaver; that no bids were made upon said property whatever except the one bid of said defendants of $1,000, subject to a prior trust of $2,000 resting thereon."

In a still further amendment of the bill offered to be made by the complainant on November 26, 1895, but which the court below declined to allow, the appellant states his claim more strongly, as follows: "That at the time of the pretended sale in this cause he had the distinct understanding and agreement with the said defendants, Kengla, that they would hold the said property, in trust for his use and benefit; that thereafter defendant Robert Kengla told complainant that he (the complainant) could redeem said property at any time within twenty years from the date of said pretended sale; that said defendant Robert Kengla at one time sent for the complainant and advised him that he (Kengla) wished to convey the complainant's interest in the said property to the complainant's wife and children; that by reason of the statements and communications of the defendants he had every reason for believing and did believe that they purposed to act in good faith with him and properly account to him for the property involved in this suit; that by reason of the communications and assurances of the defendants all suspicion that they would not act in good faith was disarmed, and he rested upon their integrity as manifested by their statements and conduct, that they would carry out in good faith the trust which they had received for his benefit."

In this statement also, it appears, the appellant seeks to account for his long delay of fifteen years before he instituted his suit, alleging, besides his reliance on the good faith of the Kenglas, his ignorance of the law and his poverty.

The Kenglas answered the bill and the amended bill of complaint; and in their answer they wholly denied that any such arrangement had been made as the appellant claimed, or that there was any arrangement whatever of any kind before the sale. They say, however, that after the sale the plaintiff (the appellant here) informed them that he believed that he could obtain a purchaser for the property at a greater price than that for which it had been sold to them; that they then said to him that, if he could get such a purchaser within two weeks from the day of sale, they would convey to such purchaser and give the plaintiff the benefit of the increased price; that the plaintiff endeavored to find such a purchaser, but failed, and finally came to them and informed them that he had failed; whereupon they obtained a deed for the property from the trustee, and thereafter heard nothing further from the plaintiff in regard to the sale to them.

The value of the property at the time of the sale on October 29, 1877, is stated by the appellant to be about $10,000 or $12,000, while

the appellees claim that it was not worth more than $3,000 or $4,000. On account, however, of an enormous rise in values in the neighborhood, due more or less to unexpected speculations, its estimated value about the time of the filing of the bill was not less than $60,000.

Within two years after the sale already mentioned to the Kenglas one Thomas L. Hume, the holder or owner of some adjacent property, and who desired through this tract a better outlet to the public highway than he then had, purchased about thirty acres, or about one-half of the tract, from the Kenglas for $2,756.89, dedicating a little over two acres of the purchase to the enlargement of the highway. Of the purchase-money only the sum of $356.89 was paid in cash, notes being given for the remainder, secured by a deed of trust, which, when foreclosed by sale some years later, on April 13, 1885, only realized $1,400 for the twenty-seven acres or upward.

The promissory note for $2,000 given by Levis, as already stated, was cancelled; the note for $300 seems to have been marked cancelled, and both notes remained in the possession of the Kenglas. Mr. William D. Cassin, a member of the bar, now and for many years dead, seems to have been the attorney of the latter at the time. But there was produced in evidence in the case a statement of account of the trustee's sale made by him, and in his handwriting, in which he distributes the purchase price of $1,000 as follows: $60 to the auctioneer, and cost of advertising; $50 to the trustee for commissions; $132.52 for taxes; $343.75 to the Kengla note (presumably principal and interest of the note for $300), and the balance, $413.73, "paid Levis; this balance paid on interest of first note for order of Levis," according to the words of the memorandum in the statement.

The trustee Weaver, who had made the sale, died some years before the institution of the suit; and George M. Kengla, one of the original defendants, and, according to Levis, the principal party to the transaction—for it is upon him that he finally seeks to charge the arrangement alleged to have been made with him—died between the date of the answer to the original bill, which was executed by him, and the time of the filing of the amended bill; and his two minor children, who are his heirs-at-law, were thereupon made parties to the suit in his place.

After replication filed and testimony taken, the main burden of which, of course, on the part of the appellant, was an attempt to support his allegation as to the agreement between himself and the Kenglas at or before the time of the sale on October 29, 1877, the cause came on for hearing, and the court below dismissed
119 the bill and the amended bill. The decision is understood to have been based mainly on the ground of the complainant's laches in postponing the prosecution of his alleged rights for fifteen years; and also upon the ground that, if there was any such agreement as he pretended, it was void under the statute of frauds as not being in writing. The complainant has appealed from that decision to this court.

We think the decision was entirely right in every respect. The

complainant has not established his case by any such preponderance of testimony as is required by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees for an indefinite period for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way for fifteen years. To establish such an arrangement as this very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainant's pretensions that when within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice without protest and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants.

But apart from the disclosures of the testimony and the inherent probabilities of the situation, the alleged agreement set up by the complainant as the basis of his claim, if any such agreement was ever made, could not be enforced by a court of equity in the face of the direct and positive prohibition of the statute of frauds; and certainly no case could well be presented more proper for the application and enforcement of that statute. Whether the alleged agreement was an agreement to reconvey in a certain contingency, as stated in the original bill, or an agreement to hold the property in trust for the use and benefit of the complainant and thereafter to reconvey, as stated in the amended bill, it was equally obnoxious to the statute of frauds, as an agreement relating to lands which was not reduced to writing and signed by the party to be charged therewith. May *v.* Sloan, 101 U. S., 237; Howland *v.* Blake, 97 U. S., 624. The trust sought to be raised is not the resulting trust that is expressly reserved from the operation of the statute by the terms of the statute itself. That resulting trust is one arising by implication or construction of law. The trust here alleged is an express trust created by express agreement to that effect by the parties themselves. If the statute may be avoided or evaded by designating an agreement as a trust, it is difficult to see wherein it can be enforced at all. Assuredly no better illustration of the propriety of the statute could be afforded than the present case, and no more appropriate opportunity for its application.

But even if the complainant's case were one of greater plausibility

and more intrinsic justice than is evidenced by his proof, it is very plain that he would be precluded by his own laches from any relief at the hands of a court of equity. For fifteen years without any adequate explanation he slept upon his alleged rights. In the meantime three very important witnesses for the defense had died; one of the defendants themselves had died before there was occasion to take his testimony, and the recollection of the transaction in all probability had become indistinct in the memory of the survivors. From the statement of account left by Mr. Cassin and the memorandum contained in it as to an order given by Levis, it is very evident that he might have been able to give important testimony in regard to the transaction; and of this testimony the defendants were deprived by the complainant's laches. Moreover, part of the property was sold in the interval; and the complainant, although he was aware of the fact, never made any inquiry in regard to it, never sought to ascertain how much had been realized from the sale, never inquired in what condition it left the account between himself and the Kenglas, all of which it would have been most natural and proper for him to do, if there had been any such arrangement as he alleges. It is true that he does not now seek relief as to this part of the property; but this acquiescence does not relieve him from the imputation of laches in regard to his alleged interests in the past.

The complainant seeks to set up his poverty, his illiteracy, and his ignorance of the law as excuses for his long delay in the prosecution of his rights. But even if the sufficiency of these excuses were more clearly shown from the testimony than they are in fact shown in the present case, it is very well settled, both upon reason and upon authority, that neither any one nor all of them combined will avail as an excuse for laches. Leggett *v.* Standard Oil Co., 149 U. S., 294; Hayward *v.* National Bank, 96 U. S., 611; McQuidd *v.* Ware, 20 Wall. 14; Naddo *v.* Bardon 47 Fed. Red. 788; Naddo *v.* Bardon, 51 Fed. Rep. 495, by Mr. Justice Brewer; De Estrada *v.* San Felipe Water Co., 46 Fed. Rep. 280.

The doctrine of equity by which the present case is to be governed is too well known and has been too frequently stated by the courts to require much citation of authority. But we may refer to Hammond *v.* Hopkins, 143 U. S., 250; Speidel *v.* Henrici, 120 U. S., 387; Brown *v.* Buena Vista, 95 U. S., 161; Sullivan *v.* Railroad Co., 94 U. S. 806; Richards *v.* Mackall, 124 U. S., 183.

We are of opinion that, for the reasons stated, the court below was right in its decision, and that its decree should be *affirmed, with costs. And it is so ordered.*

120 TUESDAY, *March 17th, A. D.* 1896.

PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla. } No. 533. January Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby affirmed, with costs.

Per MR. JUSTICE MORRIS.

March 17, 1896.

121 THURSDAY, *March 26th, A. D.* 1896.

PHILLIP LEVIS, Appellant,
vs.
CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla. } No. 533.

On motion of Mr. H. B. Moulton, attorney for the appellant in the above-entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of three hundred dollars.

122 Know all men by these presents that we, Philip L. Levis, as principal, and Edward Woltz, as surety, are held and firmly bound unto Charles R. Kengla, in his own right and as guardian of Edith Louise and Eunice Marie Kengla, in the full and just sum of three hundred dollars ($300.00), to be paid to the said Charles R. Kengla, in his own right and as guardian of Edith Louise and Eunice Marie Kengla, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Philip L. Levis and Charles R. Kengla, in his own right and as guardian of Edith Louise and Eunice Marie Kengla, a decree was rendered against the said Philip L. Levis, and the said Philip L. Levis having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Charles R. Kengla, in his own right and as guardian of Edith Louise and Eunice Marie Kengla, citing and admonishing them to be and appear at a Supreme Court of the United

States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Philip L. Levis shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

PHILIP L. LEVIS. [SEAL.]
EDWARD WOLTZ. [SEAL.]

Sealed and delivered in the presence of—
LOUIS H. STABLER.
H. B. MOULTON.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 533. Philip Levis, appellant, *vs.* Charles R. Kengla *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 10, 1896. Robert Willett, clerk.

123 UNITED STATES OF AMERICA, *ss:*

To Charles R. Kengla, in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Phillip Levis is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
GORDON & GORDON, *For Kenglas.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 10, 1896. Robert Willett, clerk.

124 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 123, inclusive, contain a true copy of the transcript of record and proceedings of said Court of

Appeals in the case of Phillip Levis, appellant, *vs.* Charles R. Kengla, in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, No. 533, January term, 1896, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of April, A. D. 1896.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,294. District of Columbia Court of Appeals. Term No., 173. Philip Levis, appellant, *vs.* Charles R. Kengla, in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla. Filed May 9th, 1896.

JAMES H. McKENNEY

Brief of Defendant-Appellant for Appellee

Filed Dec. 13, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA, *et al.*

BRIEF FOR THE APPELLANT.

HENRY E. DAVIS,
H. B. MOULTON,
For the Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA, *et al.*

BRIEF FOR THE APPELLANT.

I.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia, in a suit in equity in the Supreme Court of the District of Columbia, by the appellant as complainant, against Charles R. Kengla in his own right and as guardian of the infant defendants, Edith Louise Kengla and Eunice Marie Kengla, the said infants being also made parties defendant. The original bill, filed March 29, 1893 (Rec., 105), was brought against George M. Kengla and Charles R. Kengla, and the infants named in the amended bill (Rec., 1) are the heirs at law of the original defendant, George M. Kengla. The original bill was answered by both defendants April 25, 1893 (Rec., 108); the amended bill was filed May 16, 1895 (Rec., 1), and answered June 17, 1895 (Rec., 6), by the defendant Charles R. Kengla in his own right, and June 27, 1895 (Rec., 9), by the same defendant as guardian. On November 19, 1895 (Rec., 10), a petition for leave to file

a further amendment to the bill was made, which further amendment was placed on file November 26, 1895 (Rec., 12), and on November 26, 1895 (Rec., 13), a decree was passed by the Supreme Court of the District of Columbia, refusing permission to make the further amendment, and dismissing the original and the amended bills. On appeal this action was affirmed by the Court of Appeals of the District of Columbia March 17, 1896 (Rec., 121), the opinion of the latter court being printed in the Record (p. 115).

The suit involves certain real estate situate in the County of Washington, District of Columbia, and known as portion of a tract of land called "Alliance." On October 29, 1875, to secure a note for $2,000 payable in three years after date to the order of one Clokey, with interest at the rate of 10 per cent. per annum, payable semi-annually, the appellant deeded the property in trust to one Dodge and one Darnielle (Rec., 106, 2); a copy of the note being in the Record (p. 16.) Afterwards and on May 13, 1876, the appellant borrowed a further sum of $300 of Charles R. and George M. Kengla, giving therefor his promissory note, payable one year after date, with interest at the rate of 10 per cent. per annum, and securing the same by a deed of trust to one Weaver (Rec., 105, 2); a copy of the latter note also being in the Record (p. 17).

Default having been made in the payment of the $300 note, the property was advertised for sale under the second deed of trust (Rec., 113), and on October 29, 1877, pursuant to the terms of the advertisement, the property was sold at public auction (Rec., 106, 2, 3). The property was bid in by the Kenglas, but was not conveyed to them by the trustee Weaver until January 17, 1878 (Rec., 98–9). The Kenglas bought the property for the sum of $1,000 subject to the prior deed of trust to secure the $2,000, as appears by the testimony and the deed of the trustee Weaver. On January 18, 1878,

the property was released from the operation of the first deed of trust (Rec., 22–3), although, as appears by the terms of the note for $2,000 secured by that deed of trust, the said note was not due until the following October, or, allowing grace, the first day of November. A paper offered in evidence and purporting to be the report of the trustee Weaver, who sold under this second trust (Rec., 15), purports to show that of the $1,000 bid by the Kenglas at the sale the sum of $413.73 was "paid on interest" on account of the first note, although the interest then due on that note was a fraction over $401.

The appellant charges in his original and amended bills that at the time the property was offered for sale under the second deed of trust there was not present any one not interested in the premises, and that the bid of the Kenglas for $1,000, subject to the first deed of trust, was the only bid made; that he protested against the sale under the circumstances; that the Kenglas then and there agreed, in advance of the sale, that if he would permit the form of sale to be gone through they would take the property, satisfy themselves out of it for their indebtedness, and hold the remainder for the appellant's benefit, and either reconvey the whole of it to him on the payment of their indebtedness, or so much of it as might be left after satisfaction by them of their indebtedness, together with costs, etc.; that upon such agreement being made, a sale in form was had, and the property afterwards conveyed to the Kenglas; that, in 1879, the Kenglas sold to one Hume a portion of the property for the sum of $2,780; and that at the time of the filing of the original bill the Kenglas were about to dispose of the remainder of the property, as though they were the owners thereof (Rec., 2–4). The appellant accordingly prayed for an accounting in respect of his indebtedness under the two deeds of trust; for a reconveyance of the un-

sold portion of the property upon his satisfying his indebtedness; for an injunction, and for general relief.

As already stated, the defendants to the original bill were the two Kenglas; but, one of them having died, his heirs-at-law, the two minor defendants, were made parties in his stead. The defense is, as set out in the answer to the original bill (Rec., 109, 110), that at the time of the sale the Kenglas were the holders of the note for $2,000 as well as the one for $300; that the sale in October, 1877, was in good faith and in strict compliance with the requirements of the second deed of trust; that no objection was made by the appellant to the sale before it was accomplished, and that it was only after the sale that the appellant informed them that he believed he could obtain a purchaser for the property at a greater price than that for which it had been sold, and that they gave the appellant an indulgence of two weeks within which to find a purchaser at an increased price; and that the appellant failing, after effort, to secure such purchaser, they obtained a deed from the trustee and thereafter heard nothing further from the appellant in regard to the matter until the filing of the bill.

In connection with this defense on the facts, the further defenses of the Statute of Frauds and *laches* were relied upon.

II.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding the appellant barred by the Statute of Frauds.

2. In holding the defendant guilty of laches.

3. In dismissing the original and amended bills.

4. In not granting the appellant the relief prayed by him.

III.

ARGUMENT.

1. On the law.

(*a.*) It was contended on the hearing below that any supposed right of action of the appellant is barred by the Statute of Frauds. This statute has no place in the case, as, if the facts be in accordance with the version of the appellant, the Kenglas became, by implication or construction of law, trustees *ex maleficio* for the appellant. This takes the case out of the statute.

Seichrist's App., 66 Pa. St., 237.
Baier *vs.* Berberich, 6 Mo. App., 537.
Turner *vs.* King, 2 Ired. (N. C.) Eq., 132.
Mulholland *vs.* York, 82 N. C., 510.
Tankard *vs.* Tankard, 84 N. C., 286.
Smiley *vs.* Pierce, 98 N. C., 185.
Arnold *vs.* Cord, 16 Ind., 177.
Harris *vs.* McIntyre, 118 Ill., 275.
Sandfoss *vs.* Jones, 35 Cal., 481.
Cameron *vs.* Ward, 8 Ga., 245.
Robertson *vs.* Robertson, 9 Watts, 32.

In dealing with this question, the learned court below in its opinion (Rec., 119), says:

"But apart from the disclosures of the testimony and the inherent probabilities of the situation, the alleged agreement set up by the complainant as the basis of his claim, if any such agreement was ever made, could not be enforced by a court of equity in the face of the direct and positive prohibition of the statute of frauds; and certainly no case could well be presented more proper for the application and enforcement of that statute. Whether the alleged agreement was an agreement to reconvey in a certain contingency, as stated in the original bill, or an agreement to hold the property in trust for the use and benefit of the complainant and thereafter to reconvey, as stated in the amended bill, it was equally obnoxious to the statute of frauds, as an

agreement relating to lands which was not reduced to writing and signed by the party to be charged therewith."

The obvious error in this statement is in the fact that it assumes the agreement set up by the appellant not to have been made in fact until after the sale had been effected. It may be admitted, for the sake of argument, that if there were no agreement between the appellant and the Kenglas until after their rights had attached by their purchase at the sale, the Statute of Frauds might be applicable. But such is not this case, which is that the agreement was made before the sale, and the appellant permitted the sale because of the agreement, and the Kenglas thereby became the holders of the land, and their interest therein as purchasers attached, under conditions out of which the law in case of breach of such conditions raises the trust *ex maleficio.* While not a strict resulting trust, which is the only form of trust with which the court below deals in contradistinction to the trust by express agreement, it is a well-recognized form of trust to which the statute has no application, as is adjudged by the cases above cited.

Another feature of the case which is ignored by the court below is that at the time of the agreement relied upon as creating the trust on the part of the Kenglas, the appellant was possessed of an existing interest to be preserved, and which could sustain such an agreement as is set up. Whenever this feature is present, the Statute of Frauds cannot be availed of to defeat the agreement; and indeed we might go so far as to say that the existence of such an interest is one of the features recognized by the courts as justifying, if not indispensable to the putting out of consideration the Statute of Frauds.

This is recognized in the case of Howland *vs.* Blake, 97 U. S., 624, cited in its opinion by the court below. In that

case this court, referring to the agreement alleged to have been made by the defendants, and the question whether in fact such an agreement was made, points out (p. 628) that—

"Unless the equity of redemption of Howland was kept alive by the alleged agreement with Taylor, he had no interest which could sustain a parol agreement by the defendants to buy the property for his benefit and to convey to him when required."

The converse of this necessarily is true, viz., that where an interest exists which can sustain a parol agreement, such agreement will be enforced.

Similarly, in Robertson *vs.* Robertson, 9 Watts, 32, the court (p. 34) points out that the *mala fides* from which a trust results by operation of law depends in every case upon there being in the case more fraud than what is implied in every breach of contract, and among the other circumstances besides the refusal to perform the contract which will induce the court to hold the purchaser a trustee, is mentioned a previous interest in the land in the person alleging the trust. So, too, in Kinard *vs.* Hiers, 3 Richardson (S. C.), Equity, 423, where the plaintiff having an equitable interest in land of which he was in possession, and which was about to be sold at a judicial sale, agreed by parol to the purchase of the land by the defendant for the benefit of plaintiff's wife and children, and the defendant purchased the land and then refused to comply with his agreement, the purchaser was held a trustee; and in Von Trotha *vs.* Bamberger, 15 Col., 10, the court holds that some such feature as a subsisting valuable interest in the premises is essential to the establishment of a trust *ex maleficio*. The substance of the court's holding on this point is accurately stated in the sixth paragraph of the syllabus, which is as follows:

"Where the statute of frauds prevails, a mere oral promise to reduce to writing a verbal agreement declaring a trust in

land, and the breach thereof, are not admissible to establish such trust, except in connection with other evidence tending to show fraudulent conduct in the acquisition of the title by the party holding it; but, when the existence of fraud is thus shown, equity will declare the party thus acquiring and holding the title a trustee *ex maleficio* upon the terms of the dishonored verbal agreement, or other equitable terms, for the benefit of a person having a subsisting valuable interest in the premises."

In the case at bar, the plaintiff had at the time of the making of the agreement relied upon a subsisting equitable interest in the property, in possession of which he was; and this subsisting interest was the subject of protection by the appellant in making the agreement, and assenting to the sale without contest. This almost alone is sufficient to raise the trust *ex maleficio;* but the case is much stronger, in that the testimony of other witnesses, notably Purcell, present at the sale, and the subsequent conduct of the parties, taken in connection with the fact admitted by the defendants, that there was some bargain in the premises, show clearly that the defendants were not taking unqualified title, and that some right as to the preservation of his interest was accorded the appellant.

The only escape from the appellant's contention in the premises would seem to be, therefore, in the outright denial by this court of the doctrine of the trust *ex maleficio.*

(*b.*) It was further contended that the appellant is barred of his remedy by laches.

Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.

12 Am. & Eng. Enc. of Law, 533, and authorities cited.

Length of time alone is not a test of laches.

Paschall *vs.* Hinderer, 28 Oh. St., 568, 580.
Aylett's Executor *vs.* King, 11 Leigh, 486, 491.
Harris *vs.* McIntyre, *ubi supra.*

Where the defendant's rights have not been prejudiced by the delay, the material facts in the case sufficiently established, and the controversy not embarrassed by the claims of third persons, or by conflicting interests, lapse of time constitutes no ground for refusing relief in equity, and within what time a claim for relief will be barred depends upon the peculiar circumstances of the case, and these are always open to examination.

12 Am. & Eng. Enc. of Law, 542, Note.

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he has said or done or omitted to say or do."

Per JAMES, L. J., in *ex parte* Adamson, L. R., 8 Ch. Div., 807, 817.

And, manifestly, where a question of duty to act is presented, and that duty is on the side of the party asserting laches, rather than on the side of the party against whom it is asserted, the latter cannot be barred.

This case wholly lacks the essential ingredient of prejudice caused to the parties asserting the laches. The outline facts of the case are that there were two loans secured upon certain real estate. Under the deed securing the second loan there was a sale, and the property was bought in by

the persons lending the money, subject to the first loan. They bought in the note representing the first loan, and were the owners thereof at the time of the conveyance in accordance with the sale, if, indeed, they did not make that loan itself. They have since remained in possession of the property, which has greatly increased in value; so that, although they may have paid taxes and other expenses in connection with the property, there remains a sufficient value to repay them all their claims of what kind soever and leave a most substantial surplus; and, in addition, whatever duty there was to act was on the side of the parties sought to be charged, and the original bill was filed at a time when both of those parties were living, and there was and could be no room for the suggestion of loss of evidence so far as they were concerned.

What the court below says, in its opinion (Rec., 120), on the subject of laches, ignores the point last suggested, viz, that whatever duty there was to act in the premises was on the side of the parties to be charged, and the original bill was filed at a time when both of those parties were living. If the conditions were such as possibly to raise a trust *ex maleficio*, the very nature of that trust made it incumbent upon the Kenglas, in order to avoid the imputation of wrongdoing, to do that which they undertook to do, and which was something not passive but active, viz, to hold and deal with the property as though it were in equity the property of the appellant. Assuming the facts to be as contended by the appellant, it is clear that by the terms of the agreement the Kenglas undertook to be the trustees for the appellant, and it is beside the case to say that the appellant's mere inaction could absolve them from their obligations in the premises.

2. This brings us to a consideration of the facts of the case.

Apart from the testimony of the appellant, the defendant Charles K. Kengla, who was the only one of the defendants to testify, admitted that the appellant objected to the sale, and that an agreement was had giving the appellant time. The defendant says that he told the appellant that all the defendants wanted was their money (p. 85); that they did not want anything but what was right, and that to show him that they did not want anything more they gave him time to sell the property, and if he got more for it, all over it he could have (p. 81). It is true that the defendant said that the agreement was that the appellant should have two weeks, but this is entirely inconsistent with the conduct of the defendant, as shown below, and the testimony of the witnesses Edward Brooke and Purcell (pp. 51–2, 61–70).

Edward Brooke says that he heard Robert Kengla say that all that he wanted was to get what belonged to him out of the property; that he did not want any more out of the property than belonged to him (p. 51); that all he wanted was to get his money out of the property (p. 52).

Purcell says that the defendants, or one of them, said to him that they did not desire the land, they only wanted their money out of it (p. 62), that "they only wanted their money out of it and the rest could go to the benefit of this man Levis" (p. 65), and that for some time after the sale the Kenglas held out to him a hope to get money due him from the appellant, and made statements involving the clear admission that there was an arrangement or agreement between themselves and the appellant wholly consistent with the appellant's claim and inconsistent with the story of the defendant; and that his talks with the Kenglas on the subject were as late as two, three, or fours years, or perhaps more, after the transaction (p. 69), if not as late as 1889 (p. 64).

But by far the most convincing feature of the case is the conduct of the parties.

The sale was made subject to the prior "trust" for $2,000. The advertisement so announced (Rec., p. 113), and the answer to the original bill admits the fact (*Id.*, 109). This meant that the purchasers assumed the payment of the entire indebtedness secured by that trust. Yet, when the trustee made settlement on account of the sale, he applied part of the purchase-money—nearer one-half than one-third—towards the $2,000 indebtedness (Rec., 15). The sum thus applied the defendants accepted the benefit of, and they never returned or offered to return it to the appellant.

Moreover, the defendants never returned to the appellant either of his notes. When the original bill was filed, and even until the testimony was taken, these notes were in the possession or control of the defendants (Rec., 18–19). The release of the $2,000 trust, as already pointed out, states that the note secured by it was cancelled by the trustees by direction of the Kenglas; and the original answer states that it was cancelled by the trustees (Rec., 109). Unless there was an agreement, such as the appellant alleges, why should the Kenglas have taken and retained more than one-third of the purchase-money, to which the appellant was clearly entitled? And why should they have retained both the $300 and $2,000 notes? Of these, the former was never cancelled (Rec., 19), and it is not pretended that the appellant ever knew of the cancellation of the latter until after this suit was begun, or that he ever knew of the trustee's account (Rec., 18).

In addition, the amount applied on account of the $2,000 note, namely, $413.73, was by no calculation and on no conceivable pretense due at the time. The note was dated October 29, 1875, and bore interest at the rate of ten per cent. per annum. On October 29, 1877, the day of pretended

settlement by the trustee, but two years' interest, or $401, could possibly be claimed as due. The entry in the trustee's memorandum (Rec., 15) of this item is: "By balance paid Levis; this balance paid *on interest* of 1st note for order of Levis—$413.73." It cannot, therefore, now be contended that it purported to be applied on any other account, especially as the trustee's memorandum shows that all taxes and other expenses were fully paid out of the purchase-money.

Two most pertinent questions force themselves upon the mind: 1, if the Kenglas *bona-fide* bought the property subject to the $2,000 incumbrance, why should they have applied any part of the purchase-money to that incumbrance? and 2, why, in any event, should they have taken more than enough to meet the interest thereon?

Neither of these questions can be answered except upon the hypothesis of the appellant's contention, namely, that the Kenglas were making good their agreement and statement that all they wanted was their money, and that when they got it the appellant should, as far as possible, be revested with his rights.

Another significant fact in the conduct of the parties is that the appellant testifies that Robert Kengla told him that he might sell the property by paying $1,000 in cash and the remainder in one and two years, and pay him, Kengla, just what was due him, the cost of sale and amount of the notes (p. 38). Kengla does not deny this. The fact is most significant in showing that the appellant was dealing with Kengla on the hypothesis of a sale of the whole property and for a sum which would enable him to pay off the Kenglas and have a surplus left. Besides, the appellant mentioned one Triplett as a possible purchaser, and Kengla admits that he called on Triplett on the subject after hav-

ing allowed the matter between himself and the appellant "to run along for awhile" after the expiration of the two weeks (pp. 81, 87).

Again, as showing the continued recognition of the appellant's rights by the Kenglas, they proposed to convey those rights in such a way that they would enure to the benefit of the appellant's wife and children to the exclusion of his creditors (pp. 31–2). Robert Kengla denies this (p. 89), but Purcell says that Robert Kengla told him that he wanted the appellant *and his family* to have the benefit of the proceeds of the property over the indebtedness (p. 62); the impression made upon him was that the Kenglas, in this whole transaction, were standing between the appellant and himself, Purcell, and other creditors, were acting as protective to the appellant and preventing any of the other parties from getting a lien on the property (pp. 63–4); that if the property was sold for a greater price than the money that they had in it the appellant or *his family* should have the benefit of it (p. 70).

This is strongly confirmatory of what the appellant says about the proposed conveyance for his wife and children.

Much reliance is had by the defendants upon the fact that on May 26, 1879, they sold to one Hume a portion of the land in controversy, and that the appellant then raised no question such as is now raised as to the title and his alleged rights in the premises.

In his amended bill the appellant deals with this matter in the alternative, alleging that the amount realized was sufficient to pay his indebtedness, or, if not, that he was ready to pay the difference due. In his testimony (p. 41), he says that he understood that "Kengla had sold part of it but had not got quite what I owed him."

If the appellant so understood, he understood aright. His account stood, in May, 1879, as follows:

Second note and interest, October 29, 1877, as per trustee's account	$343.75
Expenses of sale and taxes paid, as per same	242.52
First note and interest from October 29, 1875	2,400.00
Interest on two notes ($2,300) from October, 1877, to May, 1879, @ 10%	364.16
Total	$3,351.43
Amount of Hume sale	2,756.89
Balance due	$594.54

And this does not take into account whatever taxes and other charges the defendants may in the meanwhile have paid.

While, therefore, the appellant may have heard of the Hume sale shortly after it was made, he was not entitled, under his agreement, to a settlement with the defendants, as they were not yet paid out. And the appellant says, in his testimony, that the reason that he never redeemed the property was because he had not the means to do so (pp. 33, 37), and that until the bringing of his suit he was not advised by any one that there was any necessity for him to make any application to the defendants with reference to paying the balance due them until such time as he was prepared to pay (p. 37).

It remains only to consider the inadequacy of price.

The property is valued at the time of the sale by the witnesses at various sums, reaching as high as $12,000 and upwards. The assessment for taxes, put in evidence (p. 74), should be conclusive on this point. The amount of the assessment is ($4,840+$800) $5,640. Assuming that this is at the recognized maximum of two-thirds of the real

value, the latter would be $8,460. But county property has usually been assessed at about one-half the real value, and this would make the latter $11,280. And this is undoubtedly nearer the fact, as assessments were notoriously low throughout the District at the time of the transaction.

Respectfully submitted,

HENRY E. DAVIS,
H. B. MOULTON,
For the Appellant.

No. 173.

Brief of Gordon for Appellees

Filed Dec. 14, 1897.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 173.

PHILIP LEVIS, APPELLANT,

vs.

CHARLES R. KENGLA ET AL.

Appeal from Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEES.

J. HOLDSWORTH GORDON,
Counsel for Appellees.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

On March 29th, 1893, Philip Levis, the appellant herein, led an original bill against George M. Kengla and Charles . Kengla, in which he alleges that on the 13th day of May, 876, he was the owner of certain real estate, described in he bill, containing about sixty acres. That on said 13th ay of May, 1876, he conveyed the same to one Joseph Veaver, to secure unto the said George M. Kengla and harles R. Kengla, his promissory note for three hundred ollars, to order of said Kenglas, in one year after date, with n per cent. interest. That at the date of said conveyance trust, said real estate was already encumbered to secure note of two thousand dollars ($2,000), given by the said

Levis and wife, payable in three years from October 29th, 1875, with ten per cent. interest. That on the 29th day of October, 1877, said promissory note for three hundred ($300) dollars being overdue and unpaid, said Weaver, trustee, by direction of the said Kenglas, undertook to make public sale of said real estate, on the premises, at auction, at the hour of one P. M. of said day. The appellant then alleges as follows (Rec. 106, paragraph 5):

> "But there being present no bidders or any persons interested in the purchase of said property except the defendants, the threatened sale was objected to by plaintiff, and was only permitted to be made, without protest, upon the verbal statement by defendants that they only desired to obtain out of the property, the amount of the encumbrances thereon, and that if the said sale was permitted to be made they, said defendants, would reconvey the same to plaintiff, or so much thereof as was left, after sufficient had been sold by them to satisfy the total indebtedness in full then against said property, together with the costs of sale. Whereupon, relying upon said promise, plaintiff suffered an informal sale of said property to be made to the defendants, by said trustee, at and for the sum of $1,000.00, subject to the said deed of trust for two thousand dollars. No deed, however, was made by said trustee to said defendants of said property until the 17th day of January, 1878, when the same was executed by him to said defendants, and is now of record among said land records," etc.

The appellant further alleges that the property was worth some ten or twelve thousand dollars at the time of the sale; that he does not know that any part of the one thousand dollars was ever paid, and that no account has ever been made to him. That on the 26th day of May, 1879, the Kenglas executed a deed for about twenty-seven acres of the property to one Thomas L. Hume, for a cash payment of $356.89, and a deferred payment of $2,400.00, represented

by the three promissory notes of said Hume, secured upon the property.

Appellant further states (Rec. 107, par. 9) that he:

> "continued in possession of the remaining portion of said property for nearly a year after said informal foreclosure sale, *when he moved therefrom on the receipt of a notice to quit from said defendants.*"

It is further alleged in the bill that ever since the last mentioned sale to Hume the Kenglas have continued in possession of said property, and have made no attempt to sell the same until within a few days of the filing of the bill, when they commenced negotiations for sale at a price largely in excess of sufficient to pay off the whole of what remained unpaid of the said indebtedness of $2,300, with interest and costs. It is further claimed that the sale of about two acres of the property would pay off the indebtedness remaining, and that it would be inequitable to permit the Kenglas to sell the whole of the property, and to do so would result in great loss to the appellant, for which he has no remedy except by the intervention of the court. He therefore prays: That the contemplated sale be restrained, and (Rec. 108)—

> "that an accounting may be taken of how much of said indebtedness of $2,300, with interest and costs of sale, and any other outlays of defendants on account thereof, have been satisfied by defendants out of the real estate hereinbefore described, and on the coming of the said account plaintiff may be permitted to pay said amount, and on the payment thereof that the defendants be required to reconvey said land to the plaintiff."

To this original bill the defendants, George M. Kengla and Charles R. Kengla, filed their answer on the 25th day of April, A. D. 1893 (Record, 108), admitting that they were the holders of said note of three hundred dollars and also the note for two thousand dollars named in the bill.

That said note of three hundred dollars and interest being overdue and unpaid, they requested the said trustee, Joseph Weaver, to offer the real estate upon which the same was secured (being the real estate named in the proceedings), at public auction. That the said property was sold to them by the trustee, for the sum of one thousand dollars, subject to the sum of two thousand dollars, secured by the said prior trust. That the sale was made and purchase had in good faith, and after all the requirements of the deed under which the same was offered. That they complied with the terms of sale and received a conveyance from the trustee. They say they know nothing of the alleged failure of the trustee to account with Levis, but they never heard any complaint fram him on that account, or on account of the conveyance of the property to them by deed of January 17, 1878; nor had the plaintiff made any claim of interest in the property since the said conveyance, until filing of present suit.

They deny that at any time before the sale there was any understanding, agreement, or suggestion of any kind whatsoever, between them and Levis, to impeach, or qualify the absolute purchase of the property by them, for their own use and benefit. And they declare (Rec. 110):

> "*That after said sale was made* the plaintiff informed them that he believed he could obtain a purchaser for said property at a greater price than the same had been sold to them; and wishing the plaintiff to obtain as much as possible for said property, they informed him that if he could obtain such purchaser within two weeks from the day of sale they would convey to such purchaser, and turn over to him the increased price obtained."

They further say that at the end of about two weeks the plaintiff informed them that he was unable to obtain a purchaser, and thereafter they heard nothing further from him in regard to the sale. They deny the property to be of the

value alleged, and say the price paid was fully as much as could be obtained at that time. They also admit the sale to Hume of about twenty-seven acres of the property, and at the date and at the price named, which price was obtained owing to the peculiar circumstances connected with the location of the land as an exit from Hume's property. They allege that while Levis had full knowledge of the sale, conveyance and consideration, no objection was ever presented or inquiries made in reference thereto, although the parties have been in constant communication. They further admit that the said Levis remained on the property for about one year after the sale. That this was permitted by them on account of the friendly relations that had always existed between the families. That Levis was in reduced circumstances, and was allowed to remain on the premises from friendly and charitable considerations. That, subsequently, desiring to possess themselves of the land, they gave Levis a notice to quit, and he thereupon removed from the same, making no protest against leaving, nor any claim to the property, since which time they have been in full and uninterrupted ownership and possession thereof. The defendants deny any and all claim of right, title or interest in the premises made by the plaintiff, and aver that the claim made by the plaintiff is a stale one. That the agreement for two weeks' allowance to the plaintiff, wherein to secure a purchaser, expired by its own limitation, and was not such an agreement as would bind real estate under the provisions of the Statute of Frauds. They claim that the plaintiff has failed to show in his bill anything entitling him to relief, and pray that the bill be dismissed against them with costs.

Subsequent to filing of replication George M. Kengla died and an amended bill was filed bringing in his infant heirs at law.

The amended bill differs from the original bill in but few particulars, the only material change in allegation being

contained in the sixth paragraph, wherein the plaintiff alleges that the defendants (Kenglas) at the sale agreed (Rec. 3)—

> "that if he (Levis) would permit them to go through the form of a sale, the said defendants *would take and hold* the same for the benefit of the complainant, and would reconvey the same to the complainant, or so much thereof as was left after sufficient had been sold to satisfy the defendant's claim, together with costs of sale, whereupon and relying upon the promise of the said defendants that they *would take and hold said property in trust for the use and benefit of the complainant*, he permitted an informal sale of said property to be made to said defendants by said trustee, Weaver."

Answers were filed by the parties defendant, the survivor to the original bill, Charles R. Kengla adopting in full and making as a part of his answer, the statements at large set forth in his answer, made jointly with his brother, to the original bill.

After replication testimony was taken, and cause came up for hearing. At the hearing motion was made for permission to file an additional amendment. Time was granted for the consideration of the same, and upon consideration of the proposed amendment the application for permission to file was denied, and the cause then coming on to be heard, and being considered by the court, the bill and amended bill were dismissed, with costs. From that decree appeal was taken to the Court of Appeals for the District of Columbia, which court affirmed the decree below (Rec. 121). From the latter decree appeal is taken to this court.

I.

It is claimed on part of appellees that no such agreement, as alleged between the plaintiff and defendants is established by the evidence and surrounding circumstances, but

that on the contrary, the position taken by the defendants in their answer is shown to be correct.

[In the record, as printed, a portion of the testimony for the defendants (Kenglas) precedes that for the complainant, Levis, though an examination of the dates, upon which the testimony was taken, will show that this is merely an error in the examiner in putting the testimony together.]

It will be observed that in the original bill the claim is made that the defendants agreed to "convey the property to the plaintiff or so much as was left," etc., while in the amended bill it is claimed that the defendants took the property, and "were to hold the same for the benefit of the complainant," etc. The evident intention being, if possible, to change the character of the transaction from a contract for reconveyance, as set up by the original allegation, to one in the nature of a trust, as sought to be set up in the lattter allegation. Whichever of these positions may be selected by the plaintiff, the evidence as enlightened by other circumstances, fails to establish either.

On the one side we have the testimony of Levis, wherein he declares:

> "At the time of the sale there was no one there to bid on the property, being no one only what was really interested and had to be there. I object to the sale; so Mr. Kengla asks me if I could raise $100 or $150, which I told him I could not do. Then he asked me to let the sale go on; that he did not want the land and would have nothing from it, only what I owed him; that he would sell it or I should sell it, and I was to have the benefits, all over and above what I owed him, and, of course, the expenses of the sale, etc., was mentioned." (Record, p. 28.)

The above statement embodies the claim of the plaintiff, with immaterial variations, set up by his testimony. As corroborative evidence the testimony of J. R. Purcell is introduced. This witness claims that some sort of an

arrangement was made between the parties, but what it definitely was, fails entirely to show.

He states (Rec. 61):

> "There being no bidders present, there was some arrangement entered into between Levis and Kengla by which the property was either cried out—was supposedly turned over to the Kenglas. I remember that just before this transaction took place I heard a conversation between Mr. Hume, who owned the property adjacent to this, and the interested parties; . . . the substance of which conversation was that while he was not bidding on the property, that he desired to take that part of the property which was cut off by the road leading to his farm, then named Tunlaw. . . . I remember now the transaction and the conversation that happened (Rec. 62). . . . In substance it was that Mr. Kengla did not desire—and, indeed, he so stated to me up there—he did not desire the land; only wanted his money out of it, and he wished to impress upon Mr. Levis during our walk from there that he would only act as 'a friend to his interest in this matter.'"

These two witnesses, Purcell and the complainant, are the only ones to testify to the alleged agreement upon which the suit is based. It is submitted that their testimony does not support the allegations of the bills. Indeed, there is every reason to believe that much of Purcell's testimony is merely the creation of his own fancy, aided by subsequent information that has come into his possession, and has been manufactured purely to meet the emergencies of the present case; for, as will be observed, he testifies that Mr. Hume was present at the sale, and expressed his desire to purchase a portion of the property. Mr. Kengla, on the contrary, has no recollection of Hume's presence, and swears most positively that the subject of the purchase by Hume was not mentioned until about two years after the property had been conveyed to the Kenglas. Levis makes no mention of

Hume's presence, and virtually excludes him from the list of those attending the sale; for he says (page 28 of Record), those who were present were:

> "Mr. Thomas Dowling, the auctioneer; Mr. Joseph Weaver, the trustee, and his son; Robert Kengla, and George Kengla. There was another man; I don't know his name; myself and a colored man."

The unknown man could not have been Mr. Hume, for Levis knew him, having, he claims, had former negotiations with him (Rec. 34, 35).

As a further doubt upon the evidence of Purcell we have (page 28) Levis' testimony that Kengla offered to postpone proceedings under the trust should Levis raise $100 or $150 for him. Can it be believed that had Mr. Hume been present and so anxious for a portion of the property, as claimed, that the small sum needed as a condition for the postponement of the sale would not have been forthcoming? Or that with the prospect of another purchaser, the Kenglas, who appear from the whole evidence more desirous to secure their money than to take the land, unprofitable and unmarketable as it is shown to have been, would not have willingly waited and have aided and encouraged the consummation of such negotiations?

It is further submitted, that had any such arrangement, as claimed, been entered into, it is unreasonable to believe that Purcell, an avowed creditor of Levis, should have permitted the Kenglas to have so long remained in full and undisputed control and possession of the property, when he had knowledge of the fact that his debtor held an equitable interest in a very valuable estate—far greater than his debt could possibly be. The whole testimony of this witness is unworthy of credit, and little faith, if any, can be placed in what he has said. Surely his testimony could not be a safe guide for the court.

To meet the case of the plaintiff we have the sworn answer of the defendant, George M. Kengla, now dead, made

jointly with his brother, the defendant Charles R. Kengla. We also have the testimony of the latter in which he denies the statement of the plaintiff as to the character of the agreement, and presents his claim, as to what did really occur. He states (Rec. 80 and 81), that Levis made no objection to the sale. *That after the sale—*

> "Levis thought the place did not bring as much as it ought to do. We told him we didn't want anything but what was right, and that the place had brought all it would bring; but to show him that we did not want anything more than right we gave him time to sell it, to sell the property, and if he could get more for it, all over that he got he could have. We called the trustee up and we asked him what he thought we ought to give him" [meaning how much time]. "The trustee thought a week would do. . . . Then we extended him a little longer, and we agreed on two weeks."

It is respectfully submitted that the truth of the evidence given by Mr. Kengla is shown by all the surrounding circumstances of the case.

The auctioneer, an old and experienced salesman, Thomas Dowling, testifies that he remembers no protest or objection to the sale being made by Levis—that had such been make he would, under his usual rule, have made note thereof, and that he finds none entered in the record book of the sale; thus corroborating Kengla. (Record, p. 76.) We find that Levis immediately endeavored to find a purchaser in one Dr. Triplett, and that after considerable negotiations with him the sale fell through, owing to the declination of the proposed purchaser to consummate the matter. (Testimony of Levis, pp. 29–30, and of Kengla, p. 81.) During all this time no deed had been delivered, the parties undoubtedly hoping that a purchaser might step in to take the Messrs. Kenglas' place. Nothing being accomplished, on January 17, 1878, the trustee, Mr. Joseph Weaver, conveyed the property to the defendants, Kenglas, subject to the prior

trust of $2,000 (Record, p. 98), and this deed was duly recorded. The plaintiff continued to remain on the property for about one year after the sale (Levis' testimony, p. 31); and then, *upon written notice to quit*, from the Kenglas, gave up the property to the latter. (Bill of Levis, Rec. 107, par. 9, and Kengla's testimony, pp. 81, 82.) No protest appears to have been made against this exercise of ownership by the Kenglas; nor is it claimed that any objection was made to the surrender of the property. From that time—say in October, 1878—to the date of filing the original bill in 1893, fifteen years, not one word of protest or claim of ownership was made by Levis, so far as the record shows. Again, on the 26th day of May, 1879, the defendants sold a portion of the land to one Thomas L. Hume, for $2,780. The deed for this conveyance was placed on record, and Levis knew of the sale. (Levis' testimony, p. 41.) The testimony further shows that from the sale to the date of bringing the present suit, March 29, 1893, all the taxes had been paid by the Kenglas, none by Levis. No offer to settle, according to his alleged agreement, had been made; no ownership attempted. A surrender, on notice, to the Kenglas, and no claim of any kind presented.

It is respectfully submitted that the plaintiff has utterly failed to establish any such agreement as alleged in his bill, or amended bill, and the weight of evidence shows that his contention now is but an afterthought, born of the desire to avail himself of the increased value of the land. We do not discuss the matter of the alleged inadequacy of the consideration paid for the property, for we believe the evidence shows that its market value was obtained, and, further, we do not think it an element entering into the merits of the issue presented.

The court below, commenting on the facts of the case, very justly says (Rec. 119):

> "The complainant has not established his case by any such preponderance of testimony as is required

by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees, for an indefinite period, for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way for fifteen years. To establish such an arrangement as this, very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever, upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainants' pretensions that when within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice, without protest, and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants."

Pages of argument could not more forcibly present the glaring inconsistencies between the claim of the appellant and his course of action, or show more clearly the utter want of probability in the truth of his present contention, than the language of the court, above quoted.

As this honorable court says, in Purcell *vs.* Miner, 6 Wall. 517, referring to an attempt to establish a parol contract for conveyance:

> "It is plain that a party who claims such interference has the burden of proof thrown upon him.

> He knows that the law requires written evidence of such contracts, in order to their validity. . . . When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satifactory, and indubitable proof. First: Of the contract and its terms. Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi*, or *locus penitentiæ*. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated."

It is respectfully submitted that the appellant has wholly failed to establish any such agreement as by him set up in his pleadings, and that the decree below should be affirmed.

II.

It is further submitted that even should the court consider that the appellant has established, by a preponderance of evidence, the existence of such an agreement as set up, it would not be enforced, by an equity court, in the face of the direct and positive prohibition of the Statute of Frauds. It matters not which of the positions the appellant may take. Whether the alleged agreement was one to reconvey in a certain contingency, as stated in the original bill; or one to hold the property in trust, for the sole use and benefit of the appellant, as claimed in the amended bill, and thereafter to reconvey; it would be equally obnoxious to the Statute of Frauds, as an agreement relating to lands, which was not reduced to writing and signed by the party, to be charged therewith. There is no pretense that the alleged agreement, whatever it may be claimed to be, was in writing, nor has any memoranda, touching the matter, been offered, and the statute has been specially pleaded.

(A) If the alleged agreement be taken as a contract to reconvey, it is subject to the operation of the statute.

The fourth section provides that no action shall be brought whereby to charge the defendant:

> "Upon any contract of sale of land, tenements or hereditaments, or any interest in, or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

In May *vs.* Sloan, 101 U. S. 237, this Honorable court says:

> "If the case depended upon the parol agreement set up by the complainant, whereby he claims that Asa May bound himself to convey the land to him, no relief would be granted on this bill. The Statute of Frauds would be a complete bar. The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defense as if the Statute of Frauds had been pleaded."

And in Howland *vs.* Blake, 97 U. S. 624, the same doctrine is declared. In the latter case the claim was, that one Taylor loaned Howland $7,000 upon a mortgage, to enable the latter to complete the erection of certain buildings, the entire cost being $24,000. That soon after the buildings were completed an agreement was made between the parties, which was carried out. That the possession of the property should be surrendered to Taylor, who was to collect the rents until proceeds thereof paid the principal and interest of his mortgage in full. Subsequently Taylor filed suit for foreclosure, claiming the sum of $7,000. Judgment was rendered, a sale had, and Taylor became purchaser for $9,300, and a deed was executed and delivered to him by the sheriff. It was further claimed that, while the foreclosure was in progress, it was agreed that Howland should make no defense, but allow a sale to take place; that Tay-

lor should still hold the property as security for payment of the mortgage debt, and, when the rents had been sufficient for that purpose, reconvey the premises to Howland; that under this agreement Taylor purchased, and after remaining in possession some time, desired his money and requested Howland to find some one to advance it; that Howland thereupon informed Blake and Elliot of the facts as above, and that, at his request, they advanced the necessary amount, and a conveyance was made by Taylor to them, but upon the agreement that they were only to retain the property until the rents paid them for their outlay, and that they would then reconvey to Howland. Taylor was dead at the time suit was instituted, but Blake and Elliot answered denying all equities, and the bill was dismissed by the lower court. On appeal this Honorable Court affirmed the decree below. Referring to the alleged agreement, as set up in the bill of complaint, the Court says (page 628):

> "Unless the equity of redemption of Howland was kept alive by the alleged agreement with Taylor, he had no interest which could sustain a parol agreement by the defendants to buy the property for his benefit and convey to him when required. Such an agreement is one creating by parol a trust or interest in lands, which cannot be sustained under the Statute of Frauds. It is a naked promise by one to buy lands in his name, pay for them with his own money, and hold them for the benefit of another. It cannot be enforced in equity, and is void;" also—
>
> Purcell *vs.* Minor, 4 Wall. 513.

(*b*) If, however, it be contended that something in the nature of a trusted was engrafted upon the holding of the defendants, should the evidence support the alleged agreement, this contention must also fail, for the seventh section of the statute provides:

> "All declarations or creations of trust or confidences, of any lands, tenements, or hereditaments,

> shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

The trust sought to be raised is not the resulting trust expressly reserved from the operation of the statute by the terms of the statute itself. That resulting trust is one arising by implication or construction of law. The trust alleged here is an *express trust* created by *express agreement* to that effect by the parties themselves, as says the Court of Appeals (Record 119):

> "If the statute may be avoided or evaded by designating an agreement as a trust, it is difficult to see wherein it can be enforced at all. Assuredly, no better illustration of the propriety of the statute could be afforded than the present case and no more appropriate opportunity 'for its application.'"

In Parker *vs.* Bodley, 4 Bibb, 102, the court said (103):

> "If the trust is considered as created by the agreement of the parties, if it does not come within the letter, that liberality of construction just mentioned, which is alone calculated to prevent the mischiefs intended to be prevented by the statute, *emphatically* requires it should be brought within the influence of the statute. . . . It is evident the trust in the present case, if it can be so denominated, is one created by contract, and is consequently within the statute."

That case was an agreement between two parties that one should make a purchase of land for the joint benefit of both; one made the purchase, and it was then agreed that the other should advance half of the money and be equally interested in the purchase, and it was argued that, in order to carry the transaction into effect, it should be considered as a trust, and not as a contract for a sale of

half the land, because in the latter view, the fourth section of the Statute of Frauds would prevent any remedy upon it.

It is, and was, undoubtedly the desire on the part of the plaintiff in the present suit to avoid the operation of the fourth section that led to the effort, in the amended bill, to change the alleged agreement into a sort of trust holding.

See also Chiles *vs.* Woodson, 2 Bibb, 71, where land had been conveyed by one party to another in trust for the grantor, and upon an agreement that the grantee should reconvey to any one to whom the grantor might afterwards sell. Here the court treated the transaction as a contract for land, and, there being no written evidence of the agreement, denied relief in equity on the ground of the statute.

Brown Statute Frauds, Sec. 80.

Dorsey *vs.* Clark, 4 H. & J. 556.

In considering cases presented of a contrary doctrine, it is well to remember that in Kentucky and Virginia the seventh section of the statute is not in force, and that in Pennsylvania no part of the statute is re-enacted except the first three sections, which relate to the actual conveyance of land.

Brown on Statute of Frauds, Secs. 80, 81.

There is certainly no circumstance of the present case that could incorporate upon the alleged agreement any of the features of a resulting trust. It possesses none of the characteristics of such. The property was not conveyed by the plaintiff to the defendants in consequence of misrepresentations or fraud, nor was the consideration for the purchase paid by the plaintiff. The sale was made with the consent of the plaintiff, by a third party, under a duly excuted trust and the consideration therefor proceeded alone from the defendants.

It is further submitted that where facts charged in a bill in equity are fully denied in the answer, there can be no decree against defendants on the evidence of a single wit-

ness without corroborating circumstances to supply the place of such a second witness. The witness Purcell does not aid the plaintiff, and the circumstances of the case bear out the contention made by the defendants. The court will, under no circumstances, engraft a trust upon a holding unless it be absolutely necessary from the nature of the case. As was quoted with approval by the Court of Appeals of Maryland in Groff *vs.* Rohrer, 35 Md. 336, from Cook *vs.* Fountain, 3 Swanstan, 591:

> "There is a good, general, and infallible rule that goes to both of these kinds of trusts (express or implied); it is such a general rule as never deceives, a general rule to which there is no exception, and that is this: The law never implies, the court never presumes, a trust but in cases of absolute necessity. The reason of this rule is sacred, for if chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico.*"

III.

It is further claimed that even should such an agreement as alleged be established to the satisfaction of the court the claim is now stale—barred by the *laches* of the plaintiff—and will not be enforced by an equity court.

It will be observed that over fifteen years had elapsed between the date of the transfer of the property to the Kenglas and the bringing of the present suit; during fourteen of which the defendants had been in undisturbed and undisputed possession; such possession relinquished to the defendants *on notice from them in writing, claiming ownership.* No excuse is given by the plaintiff for his course in thus supinely resting, while his rights were being frittered away, if any he had, save his alleged confidence in the parol promise of the defendants, and his poverty and consequent

inability to prosecute a suit for the enforcement of his interests. The notice to quit—acquiesced in by Levis—was sufficient to put the latter upon inquiry and give unmistakable notice of claim of adverse title. It was a positive demand upon him to deliver up the premises to others, claiming under paramount interest. He cannot plead ignorance of its meaning, for he obeyed its mandate and admitted its authority. The lame excuse now presented is not worthy of consideration. The sale to Hume was an additional notice to him of the claimed ownership on the part of the Kenglas, and still, with full knowledge, we find the plaintiff making no move whatever to assert his alleged equity. Can he now invoke the aid of this court?

In Speidel *vs.* Henrici, 120 U. S. 387, Mr. Justice Gray says:

> "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity, said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; when these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' This doctrine has been repeatedly recognized and acted on here."

It will be borne in mind that in this case many of the parties who could, if living, testify as to the real facts of the case, have long since died: The trustee, Weaver; the counsel who transacted the proceedings. Mr. Cassin; and the alleged witness to the conversations, Mr. Hume. During their lives no step is taken by the plaintiff, and it is only when their lips are sealed and their testimony is un-

available, that he presents his claim. In Brown *vs.* County of Buena Vista, 95 U. S. 161, the court declares:

> "The law of laches, like the principal of the limitations of actions, was dictated by experience, and is found in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it effect prescribes its necessity to the peace, repose, and welfare of society—a departure from it would open an inlet to the evils intended to be excluded."

And in the case, so well known in this jurisdiction, of Hammond *vs.* Hopkins, 143 U. S. 250, the court laid down the doctrine in no uncertain language.

> "No rule of law is better settled, than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

And the chief justice adds, page 274:

> "Where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and impaired their details, the welfare of society demands the rigid enforcement of the rule of diligence."

The excuse of poverty is equally insufficient. This gives no standing in court. In Leggett *vs.* Standard Oil Co., 149 U. S. 294, the court says:

> "No sufficient reason is given for this delay in suing. It is sought to be excused on the ground of the plaintiff's poverty during this period, but in the case of Hayward *vs.* National Bank, 96 U. S. 611, 618, this court said that a party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

And in the case just referred to, the court held that fifteen years' delay in seeking recovery upon a parol promise to compensate complainant was laches, declaring that—

> "This lapse of time not only constitutes a bar, such as the Statute of Limitations interposes, but shows such laches as will clearly preclude any right to relief."

In Naddo *vs.* Bardon, 51 Fed. Rep. 495, Mr. Justice Brewer, laying down the same doctrine, says that poverty is no excuse, and pays (page 497) a very just tribute to the readiness of the legal profession, at all times, to champion the poor man's cause, declaring that—

> "No man who has a just claim, and makes an effort to assert it, will ever fail of securing the needed professional assistance. The courts are always open, and the lawyers are always willing and at hand; and if he fails to establish his rights, it is because he does not make an effort to assert them."

The Court, in view of the uniform decisions of the Supreme Court of the United States, committed no error in refusing to permit the filing of the proposed amendment; which presented no additional excuse for the laches of the plaintiff, and presented no case which should not have been dismissed, had demurrer been interposed. Nor can the claimed illiteracy of the plaintiff avail him as an excuse.

> "Allegations of general ignorance of things, the knowledge of which is easily attainable, is insufficient to set into action the remedies in equity. McQuidd *vs.* Ware, 20 Wallace, 14. Nor upon well settled equitable rules can his plea of poverty and inability to pay the expenses of litigation necessary to enforce his rights, avail him."
>
> Naddo *vs.* Bardon, 47 Fed. Rep. 788.

Also—

> De Estrada *vs* San Felipe Water Co., 46 Fed. Rep. 280.

Even had there ever been a right of action in the plaintiff, his laches and acquiescence for so great a period would debar him from assistance in a court of equity.

In conclusion we again refer to the language used on this point by the court below (Rec. 120):

> "The doctrine by which the present case is to be governed is too well known and has been too frequently stated by the courts to require much citation of authority. But we may refer to Hammond *vs.* Hopkins, 143 U. S. 250; Speidel *vs.* Henrici, 120 U. S. 387; Brown *vs.* Buena Vista, 95 U. S. 161; Sullivan *vs.* Railroad Co., 94 U. S. 806; Richard *vs.* Mackall, 124 U. S. 183."

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

J. HOLDSWORTH GORDON,
Counsel for Appellees.

LEVIS *v.* KENGLA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 173. Argued January 11, 12, 1898. — Decided February 21, 1898.

Decree affirmed on a question of fact only.

THE case is stated in the opinion.

Mr. Henry E. Davis for appellant. *Mr. H. B. Moulton* was on his brief.

Mr. J. Holdsworth Gordon for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed by the mortgagor of land in the District of Columbia, more than fifteen years after the sale and conveyance of the land under a power in the mortgage, to redeem the land and to enforce a trust therein.

The Supreme Court of the District of Columbia, after a hearing upon pleadings and proofs, dismissed the bill; and its decree was affirmed by the Court of Appeals. 8 App. D. C. 230. The plaintiff appealed to this court.

The following facts were either admitted or clearly proved: Philip Levis, being the owner of the land, on October 29, 1875, made a first mortgage thereof to trustees to secure the payment of his note to one Clokey for $2000, payable in three years with interest at the annual rate of ten per cent; and on May 13, 1876, made a second mortgage to one Weaver, as trustee, to secure the payment of a promissory note to Charles R. Kengla and George M. Kengla for $300, payable in one year, with like interest. Under this second mortgage, default having been made in the payment of the $300 note, the land was advertised for sale "subject to a prior trust of $2000;" and on October 29, 1877, was accordingly sold by auction, and was bought by the two Kenglas for the sum of $1000,

subject to the first mortgage for $2000. The plaintiff remained in possession of the land for about a year after the sale, and then removed upon notice from the Kenglas to quit, and they have ever since remained in possession. On January 17, 1878, Weaver, as trustee under the second mortgage, conveyed the land to the Kenglas, in accordance with the terms of the sale, and received from them the price of $1000. On May 26, 1879, the Kenglas, with the knowledge of Levis, sold and conveyed part of the land to one Hume for the sum of $2756.89. Levis never claimed any interest in the land, after the conveyance to the Kenglas on January 17, 1878, until he filed the original bill in this case against them on March 29, 1893.

In the bill, the plaintiff alleged that, when the land was put up for sale by auction on October 29, 1877, there being present no bidders nor any persons interested in the purchase of the property except the defendants, the threatened sale was objected to by the plaintiff, and was only permitted to be made, without protest, upon an oral statement by the defendants that they only desired to obtain out of the property the amount of the incumbrances thereon, and that, if he would permit them to go through the form of a sale, they would take and hold the property for his benefit, and would reconvey it to him, or so much thereof as was left after sufficient had been sold to satisfy their claim, together with the costs of the sale; whereupon, relying upon their promise, he suffered an informal sale of the property to be made to them by the trustee.

The defendants, answering under oath, denied that, at any time before the sale to them, there was any understanding, agreement or suggestion, of any kind whatsoever, between them and the plaintiff, to impeach or qualify the absolute purchase of the property by them for their own use and benefit; and alleged that, after that sale, the plaintiff informed them that he believed he could obtain a purchaser for the property at a greater price; that, wishing the plaintiff to obtain as much as possible out of the property, they informed him that if he could obtain such purchaser within two weeks

from the day of sale, they would convey the property to such purchaser, and turn over to the plaintiff the increased price obtained; that the plaintiff endeavored to obtain such purchaser, but finally came to them and informed them that he had failed to find a purchaser; whereupon they obtained a deed from the trustee.

Upon a careful consideration of the conflicting testimony introduced at the hearing, this court fully concurs in one of the positions taken by the Court of Appeals, and stated in its opinion as follows: "The complainant has not established his case by any such preponderance of testimony as is required by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees for an indefinite period for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way, for fifteen years. To establish such an arrangement as this, very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainant's pretensions, that when, within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice, without protest, and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability, either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants." 8 App. D. C. 237.

Statement of the Case.

This view being decisive of the case, it becomes unnecessary to consider the defence of laches, or that of the statute of frauds; and a discussion of the testimony in detail could be of no value as a precedent, and would serve no useful purpose. *Harrell* v. *Beall*, 17 Wall. 590; *Tyler* v. *Campbell*, 106 U. S. 322.

Decree affirmed.